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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 642

JOSEPH DOTO, also known as JOE ADONIS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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vs.

STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey, the highest court of that state. The mandate on affirmance of said court is printed as Appendix B hereto.

Decision Below.

The opinion of the Supreme Court of the State of New Jersey is officially reported in 16 N. J. 397, 109 Atl. (2nd) 9 and is printed as Appendix A hereto. Under New Jersey practice grounds of appeal are raised by briefs (Rules 1:2-9;

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1:7-1). These rules and other pertinent rules of the Supreme Court of the State of New Jersey are printed as Appendix H hereto (*infra,* p. 56). That court certified the appeal to itself on its own motion, pursuant to Rule 1:10-1 which certification is printed as Appendix C hereto (*infra,* p. 48).

The appendix and exhibits used in the New Jersey Court and petitioner's main and reply briefs, being voluminous, are separately presented. They are duly certified.

Jurisdiction.

The judgment was dated and entered in the above action on November 8, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) and Rule 19(a) of this Court because petitioner was denied due process and statutes of the United States were drawn into question.

By an order of Mr. Justice Burton dated and filed February 4, 1955, the time within which to file this petition was extended to and including March 8, 1955.

Questions Presented.

The questions presented by this petition are:

(1) Is the interpretation and construction by the highest court of a state that Title 28 of the U. S. Code, Sect. 1741 does not require a United States consular official to certify that a copy of a foreign document had in turn been "certified by the lawful custodian" (a) a violation of the plain intendment of such statute; (b) in conflict with Federal decisions not heretofore determined by this Court and (c) in contravention of Section one of the Fourteenth amendment of the Federal Constitution?

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(2) Is the interpretation and construction by the highest court of a state that Title 28 of the U. S. Code, Sections 1732 and 1733 permits the reception of hearsay evidence contained in ship manifests filed with the Immigration and Naturalization Service (a) a violation of the plain intendment of such statutes; (b) in conflict with Federal decisions not heretofore determined by this Court and (c) deprive a defendant of the right to be confronted by witnesses as a matter of due process in contravention of Section one of the Fourteenth amendment of the Federal Constitution?

(3) Where a defendant is indicted for false swearing before a Grand Jury that he was born in the City of Passaic, County of Passaic, New Jersey, and that this statement the defendant well knew to be false, and at the beginning of the trial the prosecution, in its opening, states as its avowed purpose "* * * I intend to offer a certified copy of that record (Defendant's New Jersey birth certificate), because I propose to proceed to demolish that record. I do not undertake on my part to determine beforehand that the record is a fraud, rather I am offering that record and apprising the court in advance that it is my contention, and the evidence which I will produce will indicate that this record was fraudulently contrived", (New Jersey Appendix, p. 23a-17) and then predicates its whole case on collaterally attacking such birth record, does this constitute a denial of due notice of the charge and of due process in contravention of Section one of the Fourteenth amendment of the Federal Constitution?

(4) Where a defendant is tried as set forth in question number 3 and the State introduces in evidence police records indicating that the defendant had been arrested, fingerprinted, and had used aliases on numerous occasions,

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without showing a connection with the defendant, and the defendant's objections to arrest records and aliases being overruled, and the trial court having allowed such proof in evidence for identification, does this constitute a denial of due process and fair play, in contravention of Section one of the Fourteenth amendment of the Federal Constitution?

(5) Did the reception as pedigree evidence of 1915 and 1925 New York census records containing information concededly not furnished by the defendant and which were admissible under a New York statute in the courts of that state solely for the certification of the number of inhabitants of the state, county, town, city, village or district thereof, constitute (a) an interpretation not in accord with the plain intendment of that statute; (b) a violation of Article IV, Section one of the Federal Constitution and (c) contravene the due process and fair play provisions of Section one of the Fourteenth Amendment thereto?

Constitution and the Statutes Involved.

The pertinent constitutional provisions and the statutes involved are as follows:

1. Section one of the Fourteenth Amendment of the Federal Constitution. Appendix D, *infra*, p. 49.

2. Article IV, Section one of the Federal Constitution. Appendix D, *infra*, p. 49.

3. Title 28 U. S. Code, Sections 1732, 1733 and 1741. Appendix E, *infra*, pp. 50, 51.

4. New Jersey Statutes 2A :82-12, 16; 2A :131-4. Appendix F, *infra*, pp. 52, 53.

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5. New York P. L. 1915, Chap. 155, secs. 140, 141, 153, 158; New York Civil Practice Act, sec. 401. Appendix G, *infra* page .

Statement of the Case.

The petitioner was indicted (New Jersey Appendix 2a) for false swearing before a Grand Jury under N. J. S. 2A:131-4 as to the place of his birth. He was convicted (New Jersey Appendix, pp. 304a, 307a) of the latter, fined $1,000.00 and sentenced to prison for a term of not less than two years nor more than three years with sentence suspended pending the determination of deportation proceedings.

At the trial although the defendant was indicted for falsely swearing that he was born in the City of Passaic, County of Passaic, New Jersey, and that this statement the defendant well knew to be false, the Prosecutor opened to the Court and consistently took the position throughout the trial, that the State would establish that the defendant's New Jersey birth certificate was fraudulently contrived and that if that were so, the conclusion is inescapable that on February 10, 1953 when the defendant appeared before the Grand Jury he wilfully and deliberately lied.

The foregoing charge that the defendant knew as a fact when he appeared before the Grand Jury of Bergen County in the State of New Jersey on February 10, 1953 and swore under oath that he was born as aforementioned and at that time he knew that the aforementioned birth certificate was fraudulently contrived and false, nowhere appeared in the indictment, but this was the issue fully tried.

In support of this charge for which the defendant was not indicted, the State was permitted to introduce in evi-

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dence, over objections, certain Italian birth records without identifying that these certificates pertained to the defendant or identified him, although none of the records were certified by a United States consular official as having been made by the lawful custodian thereof as required by 28 U. S. Code 1741, under which they were offered.

The State, as part of its collateral attack upon the New Jersey birth record, was permitted to introduce to prove pedigree generally, three manifests of certain Italian ships that arrived in the Port of New York in 1904, 1906 and 1909. The defendant's objections that such manifests were inadmissible as proof in a Federal court (Secs. 1732, 1733) were overruled.

The State, as part of its collateral attack upon the New Jersey birth certificate, was also permitted, over objections, to introduce into evidence census records for the years 1915 and 1925 taken by the State of New York, pursuant to its laws for enumeration purposes only, to be considered in this case as factual proof of the pedigree statements therein contained.

The State, without ever having stated on the record the purpose of its offer, was permitted to put several New York police officers on the stand who testified to the contents of certain police records indicating that the defendant had been arrested, fingerprinted, and had used aliases on numerous occasions. The trial court subsequently on a motion to strike this testimony from the record sustained the defendant's objection to the admissibility of the fingerprint records only. The other testimony remained in the record.

The New Jersey Supreme Court held there was no error involved.

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Record References to Questions Presented.

Respecting the first question, the exemplication of the Italian birth records was challenged at the trial (N. J. Appendix, pp. 187a-19; 261a-17; 272a-5) and the trial court ruled that they were "properly authenticated and admissible under the Act of Congress and the Statute of this State * * *." (N. J. Appendix, p. 296a-14). The question was again presented in Petitioner's main brief (p. 27-9) as follows: "Here again, the State recognized the necessity of establishing that a federal statute must authorize the admissibility of such exhibits and cited 28 U. S. C. A. 1741. This statute requires that a proper consular official certify that the proffered copies have been certified by the lawful custodian." Examination of Exhibits S-8-12 discloses that the United States Consul authenticated the verification of Tonio Toni, as registrar, by an Italian president judge as to three of them (Exhibits S-8, 11 and 12). The other two (Exhibits S-9 and 10) referring to a Guiseppantonio Doto and an Antonio Doto, are barren of even such an authentication. None of these exhibits bear the authentication by the United States Consul that such registrar was the "lawful custodian" of the original records as required by the statute cited. It was repeated in petitioner's reply brief (p. 12-15). The Supreme Court of the State of New Jersey ruled that:

> "The defendant further contended that 28 U. S. C. A. sec. 1741, *supra,* was not complied with. The birth certificates of Guiseppantonio Doto and Antonio Doto, are clearly properly identified and authenticated under the federal statute. The remaining three birth certificates were authenticated by the first president of the Court of Appeals of Naples, Italy as an official act, and the Vice Consul of the United

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States authenticated that jurist's act. This was an adequate compliance with 28 U. S. C. A. sec. 1741, *supra.*" Appendix A, p. 44, *infra.*

Respecting the second question, the ship manifests were objected to at the trial (N. J. Appendix, pp. 139a-24; 250a-26, 29; 251a-8) as being irrelevant, incompetent and immaterial; as being hearsay and denying petitioner's constitutional right of confrontation. They were received in evidence as corroboration of petitioner's alien birth (N. J. Appendix, p. 297a-14). The prejudicial effect of this was raised in petitioner's main brief (p. 24-20) and reply brief (p. 10-24). Sections 1732 and 1733 of Title 28 of the U. S. Code were injected in the action for the first time by the Supreme Court of the State of New Jersey, which stated: "And it has been held that such legislation renders Federal records admissible in evidence in the courts of this state. *Katz* v. *New York Life Insurance Co.*, 125 N. J. L. 358, 359 (Sup. Ct. 1940) aff'd *per curiam*, 126 N. J. L. 370 (E. & A. 1941)." Appendix A, *infra*, p. .

Respecting the third question, no objection was made to the variance between the indictment and the proof adduced when the State collaterally attacked petitioner's New Jersey birth record. An issue was raised that the indictment was vague and so uncertain as to violate the due process clause of the Federal Constitution. This appears in petitioner's main brief (pp. 6-12) and in the reply brief (pp. 1-6). Under New Jersey practice this issue could properly be raised for the first time on appeal under the plain error rule (Rule 1:5-1), which is set forth in Appendix H *infra*, p. 56. This rule is the counterpart of Rule 52 (b) of the Federal Rules of Criminal Procedure. The Supreme Court of the State of New Jersey did not notice this issue or pass upon it.

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Respecting the fourth question, numerous arrest books of the New York Police Department purporting to relate to the petitioner were marked for identification (N. J. Appendix, p. 216a-20) and several witnesses permitted to testify as to their contents even though the books were denied admission (N. J. Appendix, p. 232a-12). Numerous general objections (N. J. Appendix, pp. 217a-22; 218a-15, 22, 30, 37; 219a-25; 220a-7, 21, 34; 221a-17, 37; 225a-18) as well as a specific motion to strike on constitutional grounds and fundamental law (N. J. Appendix, p. 225a-13) were specifically made as to this. The trial court only struck that portion dealing with the fingerprints (p. 298a-27). The other proof respecting prior arrests and aliases was admitted "for the purpose of identifying the defendant." (N. J. Appendix, p. 218a-25). Petitioner's main brief squarely raised the Fourteenth Amendment to the Federal Constitution (pp. 34-20) and pointed out the inflammatory and prejudicial nature of the proof retained in the record. The question was further considered in the reply brief (pp. 18-14). The Supreme Court of the State of New Jersey in its opinion (Appendix A, *infra*, p. 46) held: "The trial court ordered stricken from the record the greater portion of this testimony. What remained was incidental disclosure of prior arrests during the course of a New York police officer's testimony concerning admissions by Doto as to the date of his birth. Under the circumstances of this case no error is disclosed. * * *"

Respecting the fifth question, Exhibits S-20-21 were New York census records taken in 1915 and 1925 which purport to show petitioner's foreign birth. They were objected to at the trial (N. J. Appendix, p. 244a-38) and a motion made to strike them (N. J. Appendix, p. 257a-15). Despite these questions and answers:

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> "Q. Are you familiar with Section 401 of the Civil Practice Act, sir, of the State of New York? A. Offhand I don't recall it.
>
> Q. This Act excludes the census as received except for any purpose other than the determination of population and the division of the area into election districts. A. I am not familiar with that section, and frankly I am not concerned with it." (N. J. Appendix, p. 243a-35.)

the trial court ruled that they were admissible to corroborate "the status of alien birth" (N. J. Appendix, p. 298a-5). The question was raised in petitioner's main brief (p. 28-18) and in his reply brief (p. 12-27). The Supreme Court of the State of New Jersey in holding that there was no manifest wrong (Appendix A. p. 45, *infra*) stated:

> "It does not appear in the record what source of New York law was examined by the trial court in this respect nor has the defendant demonstrated on this appeal that the trial court erred."

Reasons for Allowance of the Writ.

The writ should be granted because: (1) the questions raised have not heretofore been determined by this Court; (2) they are of great public importance; (3) the decision below contravenes principles established by decisions of this Court.

1. The first question here presented involves the interpretation of Section 1741 of Title 28, United States Code. This statute has never been construed by this Court. It came into issue when the prosecutor offered in evidence five Italian birth records as corroborative proof of the place of birth of certain individuals (N. J. Appendix,

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p. 183a-18). The objections advanced at the trial and on appeal with respect to the introduction of these exhibits (S 8-12) are set forth in detail (*supra,* pages 6, 7) and also appear in the opinion of the court below, *infra,* page 43. The Supreme Court of the State of New Jersey in its opinion referred to Section 2A:82-16 of the New Jersey Statutes (Appendix F, *infra,* p. 52) which provides for the receipt in evidence of public records of a foreign state provided they are exemplified according to the acts of Congress of the United States. The act of Congress is embodied in Section 1741 of Title 28 of the U. S. Code (Appendix E, *infra,* p. 51).

This law was originally enacted June 20, 1936, Ch. 640, Sec. 6, 49 Stat. 1563. It is substantially a restatement of the common law. As early as 1804 this Court recognized the necessity for the proper exemplification of foreign documents before they became admissible in evidence. *Church* v. *Hubbert,* 2 Cranch. 187, 237; 6 U. S. 187, 237 (1804). See also *The United States* v. *Wiggins,* 14 Pet. 334, 39 U. S. 334, 346 (1840).

This statute prescribes elaborate requirements for the certification of signature and office so that due faith can be placed on certified copies of foreign records. The statute empowers consular officials throughout the world to exemplify records of foreign states so that they may be admissible in evidence in the courts of the United States. A proper certificate of exemplification permits copies of such records to become admissible as evidence without the right of a litigant to cross examine. The precautions taken by Congress should be strictly construed and followed by a uniform interpretation by the courts.

An examination of Exhibits 8-12 discloses that the United States Consul authenticated the verification of Tonio

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Toni, as registrar, by an Italian president judge as to three of them (Exhibits 8, 11 and 12). The other two (Exhibits 9 and 10) referring to a Guiseppantonio Doto and an Antonio Doto, are barren of even such an authentication. None of the exhibits bear the authentication by the United States Consul that such registrar was the "lawful custodian" of the original records as required by the statute.

The Supreme Court of the State of New Jersey by its opinion would hold that the oversight or neglect on the part of the vice consul in failing to obtain the requisite authentication could be corrected by its interpretation of the statute.

This decision is in direct conflict with *Schaffer* v. *Krestovinkow*, 88 N. J. E. 523, 103 Atl. 913, (Chan. 1918) aff. 89 N. J. E. 549, 105 Atl. 239, a previous opinion of the highest court of the State of New Jersey, which under similar facts held that rigid compliance with the requisite authentication was necessary. This case was cited in our main brief (page 27-26) but was not mentioned in the opinion of the court below.

The construction given to the statute by the Supreme Court of the State of New Jersey is in plain repugnance to the expressed provisions thereof and would destroy the safeguards provided by Congress. Section 1741 requires that copies of foreign records be certified by the "lawful custodian" of the originals and that the consul certify that the person so doing is in fact such lawful custodian. The construction below would permit the introduction of hearsay evidence without the proper and full precautionary protection intended by Congress.

The decision is in direct conflict with the construction of the statute given by the Federal Courts. See *U. S.* v. *Grabina*, 119 Fed. 2nd, 863 (C. C. A. 2-1941); *Machaty* v. *Astra Pictures*, 197 Fed. 2nd, 138 (C. A. 2, 1952); *U. S.* v.

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Anzalone, 100 Fed. Sup. 987 (D. C. Pa. 1951), reversed on other grounds, 197 Fed. 2nd, 714 (C. A. 3, 1952).

We note that this Court has the responsibility and duty to produce a uniform construction of the statute laws of the United States so that they shall have the same meaning and effect in all states of the Union. *St. Louis & Iron Mountain Ry.* v. *Taylor,* 210 U. S. 281, 293, 52 L. Ed. 1061, 28 S. Ct. 616 (1908); *Dennis* v. *United States,* 341 U. S. 494, 501, 95 L. Ed. 1137, 71 S. Ct. 857 (1950).

We are aware of the holding in *Stein* v. *New York,* 346 U. S. 156, 194, 97 L. Ed. 1522, 73 S. Ct. 1077 (1953) that the hearsay evidence rule, with all its subtleties, anomalies and ramifications, will not be read into the fourteenth amendment. We contend, however, that this case is not applicable because here a state court permitted hearsay evidence in violation of a federal statute and therefore denied the petitioner a federal right which, if not protected, would deny an accused a fair trial contrary to such amendment.

The right of an accused to be confronted with witnesses against him has always been a part of the Bill of Rights and this right is protected by the Federal Constitution and state constitutions. We also recognize that this right does not exclude proper documentary evidence. As is said in Bishop's New Crim. Proc. (2nd Ed. Sec. 1134): "The constitutional right of persons accused of crime to be confronted with the witnesses against them is interpreted as not extending to documentary proofs, * * *." See also, *Runde* v. *Commonwealth,* 108 Va. 873, 61 S. E. 792 (1908). The power to create exceptions to the hearsay rule is legislative and cannot be extended by judicial construction, which we contend was done by the court below. Cooley Const. Limitations, 8th Ed. Vol. I, p. 666.

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2. The second question here presented involves the interpretation of Sections 1732 and 1733 of Title 28, U. S. Code. This statute came into issue when the state offered in evidence manifests of S. S. *Citta DiMilano* which arrived in the Port of New York on May 9, 1904, of the S. S. *Cretic* which arrived in the same port June 15, 1905 and of the S. S. *Montserrat* which arrived in the same port on July 11, 1909 (Exhibits S 1-3). The objections advanced at the trial and on appeal with respect to the introduction of these exhibits are set forth in detail (*supra*, page 8) and also appear in the opinion of the court below, (*infra*, page 41).

Here again the State relied upon Section 2A :82-16 of the New Jersey Statutes (Appendix F, *infra*, page 52) which permits hearsay evidence contained in a public record to prove the facts therein contained if same is admissible in Federal Courts. The statutes governing the admissibility of public records in Federal Courts are Sections 1732 and 1733 of title 28, U. S. Code, (Appendix E, *infra*, page 50).

The Supreme Court of the State of New Jersey injected for the first time a meaning to these statutes contrary to their very intent and purpose, by its opinion (Appendix A, *infra*, page 41). In situations such as this, this Court has accepted jurisdiction to remedy an infraction of federal rights. *Saunders* v. *Shaw*, 244 U. S. 317, 320, 61 L. Ed. 1163, 37 S. Ct. 638 (1917). *International Steel* v. *National Surety Co.*, 297 U. S. 657, 80 L. Ed. 956, 56 S. Ct. 619 (1936); *Great Northern Railway* v. *Sunburst Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145 (1932); *Helis* v. *Ward*, 308 U. S. 365, 84 L. Ed. 327, 60 S. Ct. 283 (1939).

These two statutes have never been considered or construed by this Court. The principal reasons for the enactment of Section 1733 are well expressed in *Wong Wing Foo* v. *McGrath*, 196 Fed. 2nd 120 (C. C. A. 9-1952). Section 1732 provides for the admissibility of business records and

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is similar to the Uniform Business Records as Evidence Act. See 9 Uniform Laws Annotated, p. 365. Congress was very careful in the enactment of these statutes to protect a defendant in a criminal action against the introduction of any hearsay proof.

At the trial one of the immigration officials testified that the information appearing on the ship manifests (Ex. 1-3) was not necessarily obtained from the passengers (N. J. Appendix, p. 62a-37). Another such official testified that there was a great deal of mistakes in the spelling of Italian names (N. J. Appendix, p. 76a-9). Cross examination showed that these exhibits were unreliable, irreconcilable and undependable as the source of the information appearing in the manifests is unknown (N. J. Appendix, p. 66a-29; 75a-30; 76a-20). There was no proof by a ship's officer to identify the records or state the source of the information. The immigration officials had no personal knowledge concerning the matters shown by the manifests nor concerning their preparation, but based their testimony upon the understanding of the methods employed by ship officers in making up a manifest and of the manner in which the records in their possession were compiled. There was no proof at the trial that the defendant had furnished any of the information appearing in the manifests. The contents of them is rank hearsay.

In contrast to the foundation laid under Section 1741 for the reception of the Italian birth records there was no proof at the trial that the ship manifests would be admissible in Federal Courts or by virtue of a Federal Statute. No reference to Sections 1732 or 1733 was made at the trial. To sustain the reception in evidence of the ship manifests the Supreme Court of the State of New Jersey injected for the first time that such proof was admissible under these two sections (Appendix A, *infra*, page 42).

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In every instance where a ship's manifest was held admissible in evidence, it was in cases where the defendant or party involved had personally given the information to an immigration inspector and was received in evidence as an admission against interest rather than an exception to the hearsay rule. *Warszower* v. *United States,* 312 U. S. 342, 85 L. Ed. 401, 51 S. Ct. 46 (1941); *People* v. *Darcy,* 59 Cal. App. 2d 342, 139 P. 2d 118 (1943); and likewise the case of *McInerney* v. *United States,* 143 Fed. 729, 736-737 (C. C. A. 1, 1906), cited by the court below. The case of *Katz* v. *New York Life Insurance Co.,* 125 N. J. L. 358, 359, 15 Atl. 2nd 898 (Sup. Ct., 1940), aff'd *per curiam,* 126 N. J. L. 370, 19 Atl. 2nd 830 (E. & A., 1941) (*infra,* p. 42) cited by the court below is to the same effect.

To allow this decision of the Supreme Court of the State of New Jersey to remain as law would extend a *carte blanche* invitation for the introduction of any kind of hearsay evidence appearing in public records in the innumerable agencies of the Federal Government. Such an interpretation and construction of these statutes would be contrary to the purposes for which they were enacted.

The decision is in direct conflict with the construction of these statutes given to them by the Federal courts. See *Olender* v. *U. S.,* 210 Fed. 2d 795, 801 (C. A. 9 1954); *United Mine Workers* v. *Patton,* 211 Fed. 2d 742, 750, 751 (C. A. 4-1954); *Wong Wing Foo* v. *McGrath,* 196 F. 2d 120 (C. A. 9-1952). The courts in these three cases have collated all the cases and authorities dealing with the proper interpretation of these statutes.

The same rationale as argued hereunder with respect to the previous question at page 13 relating to this Court's duty to secure the uniform construction of Federal statutes and to secure due process and fair play of an accused as

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guaranteed by the first section of the Fourteenth Amendment is equally applicable here.

3. The third question as to whether or not the petitioner had due notice of the charge for which he was tried and convicted was raised for the first time on appeal, pursuant to state practice as pointed out herein at page 8 under the Record Reference to Questions Presented, and as also pointed out therein, the Court below did not notice this issue or pass upon it.

This Court has held that it has a duty to examine the record in order to determine whether the failure of the state court to pass on the Federal right or immunity specially set up is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. *C. B. & Q. Railway* v. *Drainage Comm'rs.*, 200 U. S. 561, 568, 50 L. Ed. 596, 26 S. Ct. 341 (1906); *Wood* v. *Chesborough*, 228 U. S. 672, 676, 67 L. Ed. 1018, 33 S. Ct. 706 (1913).

Although we do not agree with the court below that the indictment was not defective because it failed to negative the matter falsely sworn to by averring the true facts, we recognize that the sufficiency of any indictment does not present a Federal question but is solely within the province of the state courts. *Howard* v. *Fleming*, 191 U. S. 126, 48 L. Ed. 121, 24 S. Ct. 49 (1903).

We also recognize the right of the State to prove the defendant's state of mind at the time he testified before the grand jury on February 10, 1953, by evidence of his admissions and contrary conduct prior to and immediately subsequent to this date. *Cf. Baumgartner* v. *United States*,

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322 U. S. 665, 675, 88 L. Ed. 1525, 64 S. Ct. 1240, (1944); *Knauer* v. *United States,* 328 U. S. 654, 659, 90 L. Ed. 1500, (S. C. 54 Fed. Supp. 63) (1946); *Communications Ass'n* v. *Douds,* 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674 (1950).

We contend that the State cannot indict a defendant for false swearing, and in its opening and under the guise of trying the accused on this charge, introduce three completely different charges without identifying the accused or the character of the crime. In the instant action the prosecutor opened by stating that he intended to demolish the petitioner's New Jersey birth record as a fraud. This statement is quoted in full herein at page three. Also as heretofore noted at page five, the State's case and the proof it adduced was solely for the purpose of destroying the said birth record. That this was the primary theory of the State's case is further confirmed by the prosecutor's final summation to the court (N. J. Appendix, pp. 289a-17; 303a-25).

In the State's attempt to destroy petitioner's New Jersey birth certificate (Ex. S-7) it called to the stand numerous witnesses, none of whom testified that petitioner had either furnished the information about which they testified or of petitioner having knowledge of his place of birth, at the time when he was accused of falsely swearing.

We have heretofore, on page 6, alluded to the testimony of the six immigration officials through whom the ship's manifests (Exs. S-1-3) were introduced. We also alluded to the introduction of the Italian birth records of five persons at page 5, hereof. At page 6 we referred to the improper proof of New York census records. All of this testimony was received as part of the State's case to "destroy" the defendant's New Jersey birth certificate. In addition to this testimony the State also introduced as part of its proof, testimony of four relatives of the petitioner (N. J. Appendix, pp.

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85a to 134a), and the testimony of three officials of the City of Passaic to the effect that it was impossible for the petitioner to have been born in Passaic at the time evidenced by his birth certificate (N. J. Appendix, pp. 189a-204a). This latter testimony was stricken (N. J. Appendix, p. 298a-24). Aside from the foregoing, there was other testimony introduced by the State in its endeavor to "destroy" the New Jersey birth certificate of the defendant.

What the State accomplished by this procedure was in effect a trial of three independent and collateral matters outside the scope of the indictment. In substance the State tried a civil action to invalidate the *prima facie* effect of a properly and duly recorded birth certificate without instituting any direct action thereon in any New Jersey court and without notice to the necessary parties.

New Jersey birth certificates are made *prima facie* evidence of the facts therein contained by statute. N. J. S. 2A:82-12 (Appendix F, *infra*, p. 52). Public records of this sort are presumed to be correct and cannot be collaterally attacked. 53 C. J., p. 622, sec. 37; 45 Am. Jur., p. 423, sec. 9. To impeach a public record it is first necessary to seek such relief by appropriate and timely special pleadings making a direct attack thereon. *Cf. Vanderbilt* v. *Mitchell*, 72 N. J. E. 910, 67 Atl. 97 (E. & A., 1907); *Aimone* v. *Gerardi*, 108 N. J. Eq. 339, 155 Atl. 12 (Chanc., 1931); *Devlin* v. *Surgent*, 28 N. J. Super. 591, 103 Atl. (2) 55 (Chanc., 1953), aff. 31 N. J. Super. 208, 106 Atl. (2) 301 (App. Div., 1954).

The second effect of the foregoing proof constituted a trial of Joseph De Vito, a cousin of petitioner of sufficient age to have been present at his birth (Reply brief, pp. 17-29) for falsely swearing (see N. J. S. 2A:131-4, Appendix F, *infra*, p. 53) as to the contents of such birth certificate without his being indicted by a grand jury and without his having a day in court. The crime, if any, must necessarily have occurred on February 7, 1933, when the certificate was

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sworn to by said Joseph De Vito. The end result is that he was exposed to a charge outlawed by the statute of limitations without his ever being in court.

The third effect of the foregoing proof was that the defendant suborned the false swearing of Joseph De Vito in the procurement of the said birth certificate. This too, was without an indictment and after the statute of limitations had run. Moreover, when the State in its opening stated that it would "destroy" the New Jersey birth certificate, it did not then intimate that it proposed to prove a fraudulent participation by the defendant with respect to his birth certificate. In the final summation of the Prosecutor, however, he stated:

> "I say the more reasonable inference which this Court has a right to draw sitting as the trier of the facts is that the 1933 birth certificate was actually created by this defendant for purposes of his own with full knowledge that his father nor his mother at any time resided in the City of Passaic, and that being so, its very existence gives a lie to this defendant's attempt to influence this Court's thinking to believe that he actually was misled into believing that he was born in the City of Passaic" (N. J. Appendix, p. 302a-24).

The aforesaid charges were in no way connected, nor did they form part of the indictment for which the defendant was on trial. They had nothing whatsoever to do with the charge upon which the defendant was being tried and were unrelated to it in point of time and fact.

The defendant's attorney at the trial sought to protect his client against the introduction of these extraneous charges and issues, by repeated objections and reminders to the prosecutor and trial court that the issue under the indictment was not as to where the petitioner had been

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born, but what was his belief as to that fact when he testified before the grand jury in 1953 (N. J. Appendix, pp. 140a-20, 141a-7, 177a-30).

We appreciate that in a trial of a criminal case there are exceptions to the rule when other crimes may be introduced to show intent or motive. The proof here introduced by the prosecutor as we have argued, was relative to independent and collateral issues. The State admitted the *prima facie* effect of the New Jersey birth certificate and introduced this proof involving the three charges heretofore mentioned, in order to "demolish" it. The defendant could not be found guilty of false swearing as long as the certificate remained and carried its *prima facie* effect. Hence, it follows that the trial judge, as an incident to it finding the defendant guilty of false swearing, also convicted the defendant of subornation in the procurement of his birth certificate and inferentially convicted Joseph De Vito of false swearing, and, by further inference, destroyed the *prima facie* effect of this New Jersey birth record without any direct action.

If a Prosecutor can adduce proof of the character introduced in this case, which is entirely outside of the orbit of the indictment, is it not then presenting a charge not voted by a grand jury and denying the defendant the right to be informed of the nature of the accusation, in violation of his Federal constitutional rights?

An indictment must be tested upon a presumption that the defendant has no knowledge of the facts charged against him, and it should be kept in mind in this connection that the defendant is presumed to be innocent until proven guilty. 31 C. J. 650, 663. It is fundamental that a defendant has a right to be fully informed of any charge against him not only to enable him to prepare his defense, but to

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prevent him from being taken by surprise at the trial. *Sutton* v. *U. S.*, 157 Fed. 2d 661, 663 (C. C. A. 5—1946).

This court has held in *Cole* v. *Arkansas*, 333 U. S. 196, 201, 92 L. Ed. 644, 68 S. Ct. 514 (1948): "* * * It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *DeJonge* v. *Oregon*, 229 U. S. 353, 362." This court also held *In re Oliver*, 333 U. S. 257, 284, 92 L. Ed. 682, 68 S. Ct. 499 (1948) that "Due notice of the charge and a fair opportunity to meet it, are indispensable." This court likewise held in *Thornhill* v. *Alabama*, 310 U. S. 88, 96, 84 L. Ed. 1093, 60 S. Ct. 736 (1940): "* * * Conviction upon a charge not made would be sheer denial of due process."

The end result was that petitioner was deprived of a fair trial and denied that due process of law guaranteed by the 14th Amendment to the U. S. Constitution.

4. The fourth question was advanced at the trial, and on appeal, as set forth in detail at page 9 hereof. The Supreme Court of the State of New Jersey in its opinion remarked: "The defendant's question whether he was denied a fair trial by injection of 'inflammatory and prejudicial' proof was admitted by him to be a question not presented to the trial court" (Appendix A, *infra*, page 46). To the contrary we maintain that this question was properly presented to the trial court. On appeal we urged at pages 34 to 43 in our main brief that:

"Defendant was denied fair play in the trial in violation of his rights under Article I, paragraph 1

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of the New Jersey Constitution and the 14th Amendment of the United States Constitution.

(a) The State injected inflammatory and prejudicial proof that was highly incompetent and clearly inadmissible of which only a part was stricken."

This issue was squarely raised in our briefs pursuant to New Jersey appellate practice. Rules 1:2-9, 1:5-1 (a) (see Appendix H, *infra,* p. 56).

The New Jersey Supreme Court in its opinion further said:

> "This question relates to evidence of prior arrests and fingerprinting. The trial court ordered stricken from the record the greater portion of this testimony. What remained was incidental disclosure of prior arrests during the course of a New York police officer's testimony concerning admissions by Doto as to the date of his birth" (Appendix A, *infra,* p. 46).

We emphasize that the court below characterized the proof which was not stricken, as being "incidental disclosures of prior arrests."

The State introduced in evidence for identification fingerprints taken in New Jersey of the defendant on October 31, 1950 (N. J. Appendix, p. 213a-23). It made no attempt to offer this exhibit into evidence, but, apparently with design, called a detective of the City of New York (N. J. Appendix, p. 235a-30) who was shown this exhibit (N. J. Appendix, p. 236a-31) and asked:

> "Have you had an opportunity or occasion to classify the fingerprints shown on there? A. Yes,

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that's correct. Q. And in connection with your police work in New York? A. Yes, that's right; not personally, someone else did it" (N. J. Appendix, p. 236a-3).

On cross examination he testified that he never took any of these fingerprints (N. J. Appendix, p. 240a-38) and that they were just police records (N. J. Appendix, p. 241a-5). The State asked this witness whether the classification of the prints on Exhibit S-15 (for identification) indicated that it was the "same individual" (meaning the petitioner) who was arrested in New York on February 5, 1922 (N. J. Appendix, pp. 237a-16, 33) and he answered in the affirmative. The defendant objected (N. J. Appendix, pp. 237a-8, 22; 238a-12, 18, 29) but the trial court admitted the answers (N. J. Appendix, pp. 238a-13, 239a-10).

The State failed to show a connection between the New Jersey fingerprints offered for identification and the New York fingerprints testified to by the witness Cregan to identify the arrest records of the defendant (see N. J. Appendix, pp. 235a-240a). At the conclusion of the trial, the trial court ordered that the proof respecting the fingerprints be stricken (N. J. Appendix, p. 298a-25).

The State offered as a witness W. J. Cygan, who testified that he was a Captain in the Police Department of the City of New York (N. J. Appendix, p. 214a-10). The trial record demonstrates that the State had been in previous contact with him in anticipation of his testifying, so that he could make proper search of his departmental records (N. J. Appendix, p. 217a-12). He testified as to the procedure of keeping records of arrests (N. J. Appendix, p. 214a-35) and the manner of keeping these books (N. J. Appendix, p. 215a-15). The arrest books for his 79th Precinct were then offered in evidence (N. J. Appendix, p. 216a-5) but were only marked for identification (N. J. Appendix, p.

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216a-20). The Prosecutor sought to introduce this proof under the theory of the shop book rule which is expressly confined to civil actions (N. J. Appendix, p. 228a). His testimony was intended to lay the foundation for the unconnected fingerprints which indicated that a person who had fingerprints identical to the defendant's had been arrested between 1921 and 1940 (N. J. Appendix, pp. 235a-240a). The testimony of Officer Cygan was also to the effect that defendant had used various aliases (N. J. Appendix, p. 217a-27).

The prosecutor, who must be presumed to be a skilled and experienced criminal lawyer, successfully introduced this prejudicial proof in evidence. It is an impeachment of the legal learning of a public prosecutor to intimate that he did not know the aforesaid questions and answers were improper, wholly unjustifiable, and peculiarly calculated to prejudice the substantial rights of the defendant. Such conduct precludes a defendant from having that fair and impartial trial, to which, whether innocent or guilty, he is entitled. None of this proof had anything to do with establishing the elements of the crime for which the defendant was on trial. It was a subtle attempt by the State's prosecutor to offer evidence of other arrests and the use of aliases without even a plausible excuse.

It is rudimentary criminal procedure that a prosecutor can not impugn the character of a defendant unless the defendant offers himself as a witness. Vol. 3, Wharton's Criminal Procedure, (10th ed. sec. 1496). In this case the defendant did not take the stand.

Furthermore the character of the proof introduced by the State was of arrests, not convictions, which is never permissible. The court below blandly says:

> "Under the circumstances of this case no error is disclosed. Cf. State *v.* Grillo, 11 N. J. 173, 183 (1952),

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cert. den. 345 U. S. 976, 97 L. ed. 1391 (1953)" (Appendix A, *infra*, p. 46).

In *People* v. *Corey*, 148 N. Y. 476, 489, 42 N. E. 1066 (1896) dealing with evidence such as was introduced in this case, the court held:

> "* * * It is a well established principle that illegal evidence which has a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of the jurors in any degree, cannot be considered as harmless. * * *"

The very nature and character of the proof introduced by the prosecutor was vitally harmful, inflammatory and prejudicial. The classic comment of this Court is set forth in *Berger* v. *United States*, 295 U. S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935), where speaking of prosecutors, the Court said:

> "* * * He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. * * *"

This expression was adopted by the courts of the State of New Jersey in *State* v. *Orecchio*, 27 N. J. Super. 484, 501, 99 Atl. 2d 595 (1953), affd. 16 N. J. 125, 106 Atl. 2d 501 (1954). In *State* v. *Comes*, 62 N. W. 2d 753, 757 (Iowa, 1954), the court deals with this subject and collates cases showing the strong condemnatory manner in which various courts have dealt with such conduct by public prosecutors.

We are aware that in a trial heard by a judge without a jury that in such instances it is presumed that the trial

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judge necessarily disregards incompetent evidence. This is not such a situation. Here, the inflammatory material did not get into the case by a slip of the tongue of a witness. It was fully organized by the prosecutor who imported these police officials from New York so that they would be properly prepared and instructed as State's witnesses. Such deliberate action should have been reprimanded by the court below. To say that a defendant was not prejudiced by such conduct would violate every basic principle of fair play. The records shows that such evidence remained in the record, and even though the action below was tried by the court without a jury, it would be its function to weigh all of the evidence received and therefore we cannot speculate to determine whether it affected or prejudiced the defendant's rights. All that is necessary is to say that it might have.

The defendant, in his main brief to the New Jersey Supreme Court on page 41 raised as an issue,

"(b) The trial judge was influenced by the incompetent evidence and evidence stricken, and proof dehors the record."

One cannot but be impressed from the reading of the excerpts of the sentence (N. J. Appendix, p. 307a-35) of the impact the incompetent testimony had upon the court. It is crystal clear that the State's proof of early arrests and aliases reflected itself in the thinking of the court when it arrived at its verdict. The court's reference to this highly prejudicial material is contained in its remarks at the time it sentenced the defendant (see N. J. Appendix, pp. 308a-9, 309a-19, 26, 38).

This Court, in *Townsend* v. *Burke*, 334 U. S. 736, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948), and later in *Keenan* v. *Burke*, 342 U. S. 881, 96 L. Ed. 662, 72 S. Ct. 152 (1951), where the trial court considered extraneous, unfounded and improper matters in sentencing a defendant without affording the

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defendant an opportunity to correct any improper impression held such practice would be a denial of due process. The rationale adopted by this Court with respect to such practices is equally applicable to the aforesaid conduct of the trial court in this action.

5. The fifth question here presented involves the application of Article IV, para. 1 of the United States Constitution. The question raises important and novel federal questions which have never been passed on by this Court concerning the meaning and scope of the constitutional right embodied in this Article. The primary question on this point is whether or not the courts of the State of New Jersey must give full faith and credit to the public acts of the State of New York which are set forth in Appendix G, *infra* p. 54. The objections advanced at the trial and on appeal with respect to the application of these New York statutes appear at pages 9 and 10 herein.

The State sought to introduce two census records taken by the State of New York in 1915 and 1925 (Exs. S-20-21). In order to lay a foundation for the introduction of these exhibits the State sought to establish the New York law thereon. It called as a witness counsel to the Clerk of the County of Kings who testified as to a constitutional provision requiring that a decennial census be taken. The witness testified to the implementation of this constitutional provision by statute and referred to Chapter 155 of the Laws of 1915 (N. J. Appendix, pp. 241a to 244a).

None of the information appearing on any of these records were furnished to the census taker by the defendant. It was rank hearsay. The courts of New York have followed the general rule on the subject that census records are not evidential to show that the persons named therein were alive at the time, what persons constituted the same family, or their ages, or other matters necessary to show

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pedigree or heirship. *Maher* v. *Empire Life Ins. Co.*, 110 A. D. 723, 96 N. Y. S. 496, 497 (1906). See also *Gorham* v. *Settegast*, 44 Tex. Civ. A. 254, 98 S. W. 665 (1906), and cases and authorities cited therein; *Campbell* v. *Everhart*, 139 N. C. 503, 52 S. E. 201 (1905).

As heretofore pointed out herein, at pages 4 and 6, the applicable laws of the State of New York set forth in Appendix G (*infra* p. 55) specifically provide that such census records " shall be received as conclusive evidence of the number of inhabitants of the state or of any county, town, city or village, borough or district thereof." There is nothing in this law that permits the introduction of the hearsay proof as appears in census records to establish the pedigree of a defendant on trial in a criminal action.

The objection of the defendant's attorney at the trial was overruled (N. J. Appendix p. 244a-38) and again, when the defendant sought to strike this proof from the record (N. J. Appendix p. 257a-33), the court refused to do so, holding that they were corroborative of certain proof in the record (N. J. Appendix p. 297a-30).

On appeal the court below did not follow the objections raised at the trial or sustain the State's position with respect to its proffer of this evidence, but instead the court injected for the first time by way of its opinion, that "We find no manifest wrong or injury sustained by the defendant in the reception of these census records, which were proved to be public records of the State of New York". (Appendix A, *infra* p. 45.).

This question, as pointed out under Question 2 herein at page 14, can be considered by this court where there is an infraction of federal rights.

We are aware of the rule laid down by *Allen* v. *Allegany*, 196 U. S. 458, 49 L. Ed. 551, 25 S. Ct. 311 (1905) and *West-*

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ern Life Ind. Co. v. *Rupp,* 235 U. S. 261, 59 L. Ed. 220, 35 S. Ct. 37 (1914) that the mere construction by a state court of a statute of another state, without questioning its validity, creates no question under the full faith and credit clause of the Federal constitution.

It is our contention, however, that the trial court and the highest court of the State of New Jersey did not in any way interpret or construe the New York statute, but instead refused to give its plain language its true intendment, and thereby denied to this petitioner the constitutional protection afforded to him by the aforesaid Article. In so doing, it permitted in evidence in the courts of New Jersey hearsay evidence of the rankest kind without any statutory authority. Defendant was entitled to the protection of the Federal constitution.

The admission of this evidence again comes without the holding of this Court in *Stein* v. *New York,* 346 U. S. 156, 194, 97 L. Ed. 1522, 73 S. Ct. 1077 (1953). In our opinion this evidence could not be admitted in the courts of New Jersey unless it was admissible under the Laws of the State of New York, which as heretofore shown, it clearly would not be.

The more serious issue is whether the trial court and the appellate court below, in failing to give the narrow limitations to the admissibility of this proof as required by the New York statute, thereby denied the defendant fair play. This Court, in *Rochin* v. *California,* 342 U. S. 165, 173, 96 L. Ed. 183, 72 S. Ct. 205 (1952), stated what we feel is the applicable rule as follows: "* * * Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' * * *"

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Conclusion.

Questions 1, 2 and 5 involve the propriety of receiving hearsay evidence contrary to the Federal statutes and the New York statute heretofore mentioned. The serious impact of hearsay evidence was noted by the Supreme Court of the State of New Jersey in *Robertson* v. *Hackensack Trust Co.*, 1 N. J. 304, 311, 63 Atl. 2nd 515 (1949), and that court in *Ferry* v. *Settle*, 6 N. J. 254, 258, 78 Atl. 2nd 260 held: "* * * A verdict which may rest in any degree upon erroneously admitted incompetent, hearsay testimony cannot be supported * * *."

It would appear therefore that if any one of these issues are sustained by this Court as involving a Federal question, and that our position with respect thereto is sound, then necessarily the judgment of conviction, affirmed by the court below, must be reversed.

Questions 3 and 4 involve clear cut issues of the denial of fair play and due process which too, if sustained, would require that the judgment of affirmance of the conviction below be reversed.

For the foregoing reasons, petitioner requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A.

Opinion of Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY.

No. A27 September Term 1954.

State of New Jersey,
Plaintiff-Respondent,

vs.

Joseph Doto, also known as Joe Adonis,
Defendant-Appellant.

Argued October 11, 1954. Decided Nov. 8, 1954.

On appeal from Superior Court, Law Division.

Mr. Abraham J. Slurzberg argued the cause for the Appellant.

Mr. John E. Selser, Attorney.

Mr. Guy W. Calissi argued the cause for the Respondent.

Mr. David H. Harris, Special Deputy Attorney General of New Jersey, of counsel.

The opinion of the court was delivered by Burling, J.

This is a criminal action. The offense laid to the defendant Joseph Doto, also known as Joe Adonis, was false swearing, a violation of N. J. S. 2A:131-4. The defendant appealed the judgment of conviction entered against him

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in the Superior Court, Law Division. The appeal was addressed to the Superior Court, Appellate Division, and prior to hearing there was certified on our own motion.

It was stipulated at the trial in the present case that the defendant, Joseph Doto, appeared before the Bergen County (New Jersey) Grand Jury, Third Stated Session, September Term 1951, on February 10, 1953, and was duly administered an oath by the foreman who was then duly authorized to administer that oath, and that the Grand Jury at that particular time was duly and lawfully constituted. It was established in the present action, without contradiction, that Doto was asked the following question in the course of his interrogation in the grand jury proceedings aforesaid:

> "Mr. Doto, just so we can have the record complete, when and where were you born?"

To this Doto replied:

> "Passaic, New Jersey, November 5, 1901."

The State conceiving this testimony to be false, sought indictment of Doto. The same grand jury filed four indictments, two charging Doto with perjury and two charging him with false swearing. All four indictments were based upon the testimony hereinbefore quoted. One of the perjury indictments related to Doto's date of birth and the other to his place of birth. These were not moved for trial. Indictment No. 220, charging Doto with false swearing as to the date of his birth and Indictment No. 221, charging him with false swearing as to the place of his birth, filed February 17, 1953, were moved for trial. It is the consolidated trial of these two false swearing indictments which is the source of the present appeal. Doto waived a jury and a trial to the court ensued. At the close of the State's case Doto moved for judgment of acquittal on both indictments for failure of proof. R. R. 3:7-6. The motion was denied. Doto then rested his case without

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introducing any evidence and repeated his motions for judgment of acquittal on both indictments. R. R. 3:7-6, *supra*. The trial court denied the motions. The trial court subsequently heard closing arguments of counsel and took a short recess to deliberate. Thereafter the trial court found Doto not guilty of false swearing as to the date of his birth, but found him guilty of false swearing as to the place of his birth. Upon these findings verdicts were entered, guilty as charged on Indictment No. 221, and not guilty on Indictment No. 220. Sentence was imposed on February 2, 1954, on the conviction under Indictment No. 221, and Doto appealed.

The questions involved on this appeal include whether (a) an indictment is valid under N. J. S. 2A:131-4 (*i.e.*, for false swearing) where it fails to contain explicit negation of the truth of the statements on which the indictment is based; (b) the defendant's motions for judgment of acquittal on Indictment No. 221 should have been granted; (c) the trial court erred in its rulings on the admissibility of evidence; (d) the defendant received a fair trial; and (e) the evidence supports the judgment of conviction.

I.

The first question involved is addressed to the sufficiency of the indictment. Doto contends that in Indictment No. 221 the alleged false statement is not adequately negatived by an averment of the true fact. If error in the format of the indictment exists as alleged by Doto, it is asserted for the first time on this appeal. The indictment sufficiently apprised him of the charge against him and was subject to amendment under R. R. 3:4-5, formerly Rule 2:4-13.

This is not a perjury action but is a prosecution for the statutory offense of false swearing under N. J. S. 2A:131-4, *et seq.* The alleged error in the indictment consists of the purported failure of the State to sufficiently

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negative the truth of the statements Doto was alleged to have made under oath. The pertinent portion of Indictment No. 221 reads as follows:

> "* * * and the said Joseph Doto, also known as Joe Adonis, being so sworn as aforesaid, did wilfully swear falsely in substance and effect that he was born in the City of Passaic, County of Passaic and State of New Jersey, which said statement the said Joseph Doto, also known as Joe Adonis, then and there well knew was false, contrary to the form of the statute in such case made and provided, against the peace of this State, the government and dignity of the same."

The theory of the defense in this case is that the crux of the issues is Doto's belief at the time he gave the alleged false testimony. In perjury cases, analogy to which for the purposes of this limited question concerning the sufficiency of the indictment seems permissible, the general rule seems to be that the indictment should expressly contradict the the matter alleged to have been falsely sworn to by the defendant. 2 Wharton's Criminal Law, Ruppenthal (12th ed. 1932) sec. 1566, pp. 1825-1826. Cf. *Heintz* v. *Union Quarter Sessions*, 45 N. J. L. 523, 525 (Sup. Ct. 1883); 2 Criminal Laws of New Jersey, Schlosser (Rev. ed. 1953), sec. 1938, p. 952. Compare, however, *State* v. *Voorhis*, 52 N. J. L. 351, 357 (Sup. Ct. 1890).

Where the accused "has sworn only to his belief, it will be proper to aver either that the defendant did not believe what he swore, or that 'he well knew' to the contrary." 2 Wharton's Criminal Law, *ante*, sec. 1568, p. 1826. It is said that in this respect indictments for perjury are sufficient if they state that the testimony of the defendant was false. 41 Am. Jur., Perjury, sec. 33, pg. 20. Cf. *State* v. *Sullivan*, 25 N. J. Super. 484, 492 (App. Div. 1953), certification denied 13 N. J. 289 (1953), cert. den. 347 U. S. 902,

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98 L. ed. (1954). Assuming for the purposes of this appeal that formal negation of the alleged false statement in the indictment by expression of the truth of the fact is required in indictments for perjury in this State, and applies as well to an indictment for false swearing, the principles above adverted to indicate that the present indictment is, even so, sufficient.

Further the indictment for false swearing is concerned with a statutory offense. The indictment in the present case was in the statutory language and explicitly apprised the defendant of the offense charged. It is in these respects adequate under the principles embodied in *State* v. *Harris,* 132 N. J. L. 54, 57 (Sup. Ct. 1944). Cf. *State* v. *Morris,* 98 N. J. L. 621, 623 (Sup. Ct. 1923), aff'd *per curiam,* 99 N. J. L. 526 (E. & A. 1924). The essence of constitutional right in relation to the sufficiency of an indictment is that the accused be "informed by the indictment in certain, definite and understandable terms of the crime charged to him." *State* v. *Grothmann,* 13 N. J. 90, 97 (1953). We find that Indictment No. 221 meets this test. Cf. *State* v. *Kowalczyk,* 3 N. J. 51, 55-56, 60-61 (1949).

II.

The questions involved include the question whether the trial court should have granted the defendant's motions for judgment of acquittal on Indictment No. 221 made at the close of the State's case. R. R. 3:7-6, *supra.* We find that the trial court's denial of the motions was correct.

The theory advanced by the defendant is that even conceding that Doto was actually born in Italy, there is no proof that he knew that fact and his alleged honest belief that he was born in Passaic, New Jersey, is an adequate defense (even though he did not take the stand and testify to such alleged belief). Doto argues that from the very nature of the issue he could have no positive knowledge

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whether he was born in the United States, citing *Ark Foo* v. *United States*, 128 F. 697, 699 (2nd Cir., 1904).

One who believes he is testifying falsely or who does not know whether his testimony is true or false may be guilty of false swearing.

"A person may commit perjury either by swearing to a fact which he knows is not true, or by swearing to his knowledge or belief as to a fact when he has no such knowledge or belief." Clark and Marshall, Crimes (5th ed. 1952) sec. 446, p. 444.

In other words it may be perjurious for one to swear that a fact exists when he knows nothing about it or thinks or believes the contrary of his testimony. Clark's Criminal Law, Mikell (3rd ed. 1915), pp. 444-445; I Burdick, Law of Crime (1946), sec. 329, pp. 489-490.

It has been said that while a defendant's belief in the truth of his statements can only be determined in the light of his own intent, a court cannot unqualifiedly accept that which the defendant asserts was his understanding at the time of the giving of the alleged false testimony. 102 Univ. of Pa. L. Rev. 251 (1953). The chief "*raison d'etre*" of evidentiary data regarding other persons' mental conclusions "rests on the high probability of a 'sufficiently' accurate representation of inner states by external conduct and the consequent validity of relevant findings of fact * * *." Hall, Principles of Criminal Law (1947) pp. 177-180. Cf. *Communications Ass'n* v. *Douds*, 339 U. S. 382, 410, 94 L. ed. 925, 950 (1950); 2 Wigmore on Evidence (3rd ed. 1940) secs. 244, 256, 261.

Where belief in the truth of the statement is the issue all testimony which constitutes circumstantial evidence of the falsity of the defendant's statement has been said to be direct evidence of the defendant's belief. Formulation in Terms of Belief of the Rule of Evidence Applicable to Perjury Cases, 51 Colum. L. Rev. 1056, 1056-1057 (1951). See also 7 Wigmore on Evidence (3rd ed. 1940) sec. 2042, p. 281. Anno. 42 A. L. R. 1058, 1063; 27 A. L. R. 848, 857; 15 A. L. R. 629, 634.

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Appendix A.

In prosecution for false swearing under N. J. S. 2A:131-4, *et seq.*, "Corroboration or proof by more than one witness to establish the falsity of testimony or statements under oath is not required." N. J. S. 2A:131-6. The statute requires that the proof show that the false statement was willful, *i.e.*, "intentional and knowing the same to be false." N. J. S. 2A:131-7. In this respect we have heretofore clearly expressed the rule in *State* v. *Siegler*, 12 N. J. 520, 524 (1953), to be that the State's proof need not necessarily be by direct evidence but the burden may be met by circumstantial evidence.

There was adequate evidence in the present case to demonstrate for the purpose of disposition of the motions for judgment of acquittal on Indictment No. 221 at the close of the State's case that Doto was born in Italy and that he believed he was born in Italy, maintaining that belief at the time he swore before the Grand Jury that he was born in Passaic, New Jersey.

III.

Included in the questions involved is the rectitude of the trial court's rulings upon objections by the defendant to introduction of evidence by the State. Dean Pound has said, "The question as to what is the truth easily becomes lost in critical scrutiny of proceedings at a trial in order to determine whether the technical rules of evidence were or were not observed * * *." Pound, Criminal Justice in America (1945), p. 71.

Nevertheless we do not permit a sense of moral justice to overcome such error in this respect as may deprive a defendant of fair play. Our review is expressly designed to ensure that the defendant is not deprived of liberty by any error that prejudices his substantial rights, *i.e.*, to ensure that the defendant does not suffer any manifest wrong or injury. R. R. 1:5-1(a). Cf. National Conference of Commissioners on Uniform State Laws, Uniform Rules

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of Evidence (1953), Rule 4; American Law Institute, Model Code of Evidence (1942) Rule 6(b).

The defendant asserts that introduction of alleged hearsay testimony as to the defendant's pedigree and place of nativity was error.

A. There was received in evidence testimony of uncles and brothers of the defendant as to the names of his parents, their residences in Italy and in this country, the times of their arrival with their children in this country and of the defendant's residence here. The defendant asserts error in this respect without references to the specific testimony he condemns. Much of the testimony of these family witnesses was direct, not hearsay. See 2 Wigmore on Evidence (3rd ed. 1940), secs. 265, 266, 270, pp. 87-91, 100 *et seq.* There was to some extent, however, reference to statements made by the defendant's mother and father who are, according to testimony, deceased. The declaration testimony elicited was within the rule in pedigree matters that "* * * where the evidence offered is the *declaration of an individual member* of the family, the necessity for this person's hearsay lies merely in the impossibility of procuring the declarant himself to testify on the stand; *i.e.*, the death * * * of the *declarant alone* suffices * * *." 5 Wigmore on Evidence (3rd ed. 1940), sec. 1481, p. 295. It did not include the decedent's declarations as to Doto's place of birth but only his parentage, which is permissible. *Independence* v. *Pompton*, 9 N. J. L. 209, 212-213 (Sup. Ct. 1827). Therefore we are not called upon to decide the entire scope of facts admissible under this exception to the hearsay rule but merely those that are pertinent to this action. See 5 Wigmore on Evidence, *ante*, sec. 1502, pp. 323-324. And the question of pedigree is material to the present case. *Ibid.* sec. 1503, pp. 324-325. Cf. *Westfield* v. *Warren*, 8 N. J. L. 249 (Sup. Ct. 1826). It is unnecessary to decide whether a limitation as to the kind of issue involved exists in this State as indicated in the *Westfield* case, *supra.*

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Appendix A.

B. The State also introduced in evidence manifests of the SS. *Citta DiMilano* which arrived in the Port of New York on May 9, 1904, of the SS. *Cretic* which arrived in the Port of New York on June 15, 1906, and of the SS. *Montserrat* which arrived in the Port of New York on July 11, 1909. The defendant's objection at the trial was two-fold: that the manifests were not competent because their credibility was lessened by other evidence in the case—an obvious *non sequitur*—and that the manifests were neither relevant nor material because "There isn't an issue here of where was Doto born" and "It becomes material only when it is established that he knew it." This alleged ground is clearly frivolous. However, the defendant on a subsequent motion to strike contended that the manifests were inadmissible hearsay evidence.

The State recognizes that the steamship manifests above referred to are a form of hearsay evidence but relies for their admissibility on the provisions of N. J. S. 2A:82-16, the pertinent portion of which reads as follows:

> "* * * any duly certified public record of any department of the United States government * * * which is admissible in any federal court or by virtue of any federal statute to prove the facts therein contained, shall be admitted in evidence in the courts of this state, and shall be evidence of the facts therein contained, to the same extent as though the original paper or papers * * * had been produced and proved * * *."

A federal statute provides that "Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept." June 25, 1948, c. 646, 62 Stat. 946, 28 U. S. C. A. sec. 1733. And the federal act further provides that in any federal court "* * * any writing or record, whether in the form of an entry in a book or

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otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event * * *" and "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility." June 25, 1948, c. 646, 62 Stat. 945, 28 U. S. C. A. sec. 1732. This legislation has been held to be constitutional. *Tot* v. *United States,* 319 U. S. 463, 63 S. Ct. 1241, 87 L. ed. 1519 (1943). And it has been held that such legislation renders federal records admissible in evidence in the courts of this state. *Katz* v. *New York Life Insurance Co.,* 125 N. J. L. 358, 359 (Sup. Ct. 1940), affirmed *per curiam,* 126 N. J. L. 370 (E. & A., 1941).

In *McInerney* v. *United States,* 143 F. 729, 736-737 (1st Cir. 1906) it was held that a verified copy of a ship's manifest containing a list of its alien immigrant passengers and giving their names, nationality, last residence and destination, delivered to the inspection officers of a port of the United States as a report under the Act of March 3, 1891, c. 551, sec. 8, 26 Stat. 1085, and preserved in the immigration office, is a public record admissible as evidence of the facts stated therein. The federal court in the *McInerney* case, supra, observed (143 F. at page 737):

> "We perceive no substantial difference between the requirements of the statute here and those of the English statute, under which, upon very forcible reasoning, it was held in Richardson *v.* Mellish, 2 Bing. 229, that the list of passengers returned by the captain under the authority of the English act was admissible evidence as against third parties. The principle of the English case was apparently adopted with approval by the Supreme Court of the United

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States in Buckley *v.* United States, 4 How. 251, 258, 11 L. Ed. 961."

The United States Supreme Court in *Buckley* v. *The United States, cit. supra,* held that customs appraisements were admissible in evidence and stated (4 How. at page 258, 11 L. Ed. at page 965):

"* * * the copy of an official document containing the names, capacities, and descriptions of passengers on board a vessel, made in pursuance of an act of Parliament, has been received as proof of such persons being on board. (Richardson *v.* Mellish, 1 Ryan & Moody, 68; 2 Bing., 229)."

Similarly a ship's log book has been held to be "clearly admissible" in evidence in a negligence case as proof of facts connected with the alleged occurrence. *Lopoczyk* v. *Chester A. Poling, Inc.,* 152 F. 2d 457, 459-460 (2nd Cir., 1945). Cf. *The Ariel,* 110 F. 2d 866, 867 (2nd Cir., 1941); 5 Wigmore on Evidence (3rd ed. 1940) sec. 1530, pages 376, *et seq.;* sec. 1641, pages 558, 559 (Esp. note 6).

We conclude from the examination of the pertinent authorities that the ship's manifests were properly received in evidence in the present matter.

C. The defendant's trial objection to the introduction in evidence of Italian vital statistics records showing the births of five people was also overruled, and these exhibits were received in evidence. That they were relevant and material under the circumstances of this case seems so clear that no discussion of this point is necessary. The defendant also contended at the trial and on appeal that reception of these Italian records violated his constitutional rights. N. J. S. 2A:82-16, *supra,* in addition to the hereinbefore quoted provisions relating to federal records provides that any "public record of any foreign state or territory, province, county or city, or of any court therein or any copy thereof, which is admissible in such state, territory,

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province, county or city, or in any court therein, to prove the facts therein contained * * * shall be admitted in evidence in the courts of this state * * *'' etc., provided it shall be exemplified according to the acts of congress of the United States. The requisite authentication under an act of congress is expressed in the Act of June 25, 1948, Ch. 646, 62 Stat. 947, amended May 24, 1949, c. 139, sec. 92 (b), 63 Stat. 103, 28 U. S. C. A. sec. 1741. As to constitutionality of this legislation, *Tot* v. *United States, supra,* is dispositive. Likewise applicability in the courts of this state appears to be dispositively settled under the rationale of *Katz* v. *New York Life Insurance Co., supra.*

The defendant further contended that 28 U. S. C. A. sec. 1741, *supra,* was not complied with. The birth certificates of Guiseppantonio Doto and Antonio Doto, are clearly properly identified and authenticated under the federal statute. The remaining three birth certificates were authenticated by the first president of the Court of Appeals of Naples, Italy as an official act, and the Vice Consul of the United States authenticated that jurist's act. This was an adequate compliance with 28 U. S. C. A. sec. 1741, *supra.* The defendant relied on *United States* v. *Grabina,* 119 F. 2d 863, 865 (2nd Cir. 1941) as authority to the contrary. In the *Grabina* case, *supra,* the decision turned on deficiencies inherent in a Polish birth certificate rather than on the Vice Consul's authentication of the custodial depository officer's signature. No such defect appears here.

D. New York State census records for 1915 and 1925 were received in evidence at the trial over the defendant's objection that they were hearsay and there was no proof that Doto had knowledge of their contents. These objections have no merit. The defendant now contends that such records are not admissible in evidence in New York State and therefore are inadmissible under N. J. S. 2A:82-16, *supra.* No such objection was asserted before the trial court. The trial court may inform itself of foreign laws

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in such manner as it may deem proper. N. J. S. 2A:82-28. It does not appear in the record what source of New York law was examined by the trial court in this respect nor has the defendant demonstrated on this appeal that the trial court erred. The defendant alluded to *In re Hennion's Estate,* 131 N. J. E. 293, 294-295 (Prerog. 1942). The Vice Ordinary in that case did not expressly exclude the evidence but held it was "not persuasive" because it lacked clarity and did not "indicate the source of its information". Comparable conclusions were expressed by the former Supreme Court in *Kiely* v. *MacMurray,* 5 N. J. Misc. 1091, 1093 (Sup. Ct. 1927) also relied on by the defendant.

We find no manifest wrong or injury sustained by the defendant in the reception of these census records, which were proved to be public records of the State of New York.

E. We find no merit in the defendant's contention that testimony of a New York police officer concerning prior admissions of the defendant as to the place of his birth should have been excluded.

F. The defendant also objected to the introduction of evidence by the State concerning admissions by the defendant, as to his place of birth, made during the course of his testimony at deportation proceedings in June, 1943. The principal ground of objection was that the whole of Doto's testimony at the deportation proceedings was not offered by the State. The defendant's cross examination of the witness who testified with respect to Doto's deportation hearing admissions resulted in introduction in the present case of the testimony that the defendant deemed essential. Under the circumstances we find no error. The remaining arguments of the defendant concerning this evidence are without merit.

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IV.

The defendant's question whether he was denied a fair trial by injection of "inflammatory and prejudicial" proof was admitted by him to be a question not presented to the trial court. This question relates to evidence of prior arrests and fingerprinting. The trial court ordered stricken from the record the greater portion of this testimony. What remained was incidental disclosure of prior arrests during the course of a New York police officer's testimony concerning admissions by Doto as to the date of his birth. Under the circumstances of this case no error is disclosed. Cf. *State* v. *Grillo,* 11 N. J. 173, 183 (1952), cert. den. 345 U. S. 976, 97 L. ed. 1391 (1953).

The arguments addressed to this court indicate the defendant also attacks the validity of the trial court's findings upon the ground that the determination was against the weight of the evidence. This was not asserted as a question involved. However, in view of the nature and course of the prosecution in the present case we have examined the record meticulously to determine whether the evidence supports the findings and judgment of the trial court. In this respect the evidence clearly is adequate and we see no occasion to recite it in detail.

Conclusion.

For the reasons expressed in this opinion the judgment of the Superior Court, Law Division, is affirmed.

A true copy.

John H. Gildea,
Clerk.

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Appendix B.

Mandate on Affirmance.

SUPREME COURT OF NEW JERSEY.

Appeal Docket No. 1690.

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* JOSEPH DOTO, also known as JOE ADONIS, Defendant-Appellant.	Criminal Action On Appeal.

This cause having been duly argued before this Court by Mr. Abraham J. Slurzberg, counsel for the appellant and Mr. Guy W. Calissi, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court, Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the eighth day of November, 1954.

Filed
November 8, 1954
John H. Gildea, Clerk

JOHN H. GILDEA,
Clerk
Clerk of the Supreme Court.

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Appendix C.

Order on Certification.

SUPREME COURT OF NEW JERSEY.

No. 1690 SEPTEMBER TERM, 1954.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOSEPH DOTO, also known as JOE ADONIS,
Defendant-Appellant.

Civil Action.
On Certification.
Order.

Pursuant to Rule 1:10-1 it is ORDERED that the appeal from the judgment entered in this cause on February 2, 1954, in the Superior Court, Law Division, now pending in the Superior Court, Appellate Division (A-478-53), be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the issuing of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated October 7, 1954.

By the Court.

ARTHUR T. VANDERBILT,
Chief Justice.

Filed Oct. 7, 1954.

JOHN H. GILDEA,
Clerk.

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Appendix D.

Constitutional Provisions Involved.

U. S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. Art. IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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Appendix E.

Federal Statutes Involved.

28 U. S. Code, Sect. 1732. Record made in regular course of business.

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business" as used in this section, includes business, profession, occupation, and calling of every kind.

28 U. S. Code, Sect. 1733 (a) "Government records and papers; copies.

"* * * Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept. * * *"

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Appendix E.

28 U. S. Code, Sect. 1741. "Foreign Documents, General Copies.

A copy of any foreign document of record or on file in the public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian."

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Appendix F.

New Jersey Statutes Involved.

N. J. S. 2A:82-12. Certified copies and records of returns of vital statistics:

Any original certificate of marriage, marriage license and consent to the marriage of minors, or any part thereof, and any copy of the record of any marriage, certified to be a true copy under the hand of the state registrar of vital statistics, any original certificate of birth or death, or any copy thereof, or any copy of the record thereof, certified to be a true copy under the hand of the state registrar; any transcript of return of death, marriage or birth, made by any person according to law, to any officer or board empowered by law to receive the same or of the record of such return, such transcript being a copy of the return as originally made or a copy of the record thereof as recorded according to law, when such transcript shall be signed by the officer required by law to return or record the same as the case may be and, by him certified to be a true copy of said return or record, shall be received as prima facie evidence of the facts therein stated in all courts and places.

N. J. S. 2A:82-16. Public records of foreign states or territories; United States departments or courts; copies; rates, etc.

Any public record of any foreign state or territory, province, county or city, or of any court therein or any copy thereof, which is admissible in such state, territory, province, county or city, or in any court therein, to prove the facts therein contained, or any duly certified public record of any department of the United States government or of any federal court which is admissible in any federal court or by virtue of any federal statute to prove the facts therein contained, shall be admitted in evidence in the

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courts of this state, and shall be evidence of the facts therein contained, to the same extent as though the original paper or papers, of which the record thereof is a copy, had been produced and proved; provided, that whenever a copy of such record, other than a duly certified copy of any public record of any department of the United States government or of any federal court, shall be offered in evidence, the same shall not be admitted, unless the same shall have been first exemplified according to the acts of congress of the United States; * * *

N. J. S. 2A:131-4. False swearing; offense stated:

Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing and punishable as for a misdemeanor.

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Appendix G.

New York Statutes Involved.

LAWS OF NEW YORK, 1915. Chap. 155, p. 528.

§140. *When enumeration shall be taken.* An enumeration of the inhabitants of this state shall be taken during the months of May and June, in the year nineteen hundred and fifteen, and in said months every tenth year thereafter.

• • • • • •

(Page 529)

§141. (6) *Filing of report.* Transmit, within ten days after the final completion of the enumeration, to the county clerk of each county to which such returns relate a certified copy of the portions of such report which relate to such county to be filed and become a record of such county clerk's office.

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(Page 535)

§153. *Commencement of enumeration; how enumeration made.* On such day in the month of May or June, as the secretary of state shall direct, each enumeration supervisor shall cause the enumerator within his district to enumerate truly and accurately the inhabitants residing in the enumeration district for which he shall have been appointed, and to ascertain the facts and statistics required by the population schedule or return. It shall be the duty of each enumerator to visit personally each dwelling-house in his district and each family therein and each individual living out of a family in any place of abode, and by inquiry made of the head of each family or of a member or members thereof deemed credible and worthy of trust, or of such individual living out of a family, to obtain each and every item of information and all particulars required by this article and the regulations of the secretary of state as of such date in May or June as so directed by the secretary of state. * * *

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Appendix G.

(Page 537, §153)

* * * In making such enumeration he shall for the purpose of identification ascertain and include the sex, age, color, nativity, citizenship or alienage, and the occupation of each inhabitant, with his residence by street and number, if any, or if there is no street and number, then such description as shall identify the place of residence. Such enumerator shall specially ascertain and note as to the citizenship of all foreign born inhabitants, and if they are naturalized shall require them to exhibit their naturalization papers. The names of children of naturalized citizens and of aliens shall be specially noted and the schedules, blanks and cards shall be so prepared as to permit facts as to citizenship and alienage to be carefully and clearly noted * * *.

* * * * * *

(Page 539)

§158. *Certificate of Secretary of State conclusive evidence.* A certificate under the hand and seal of the secretary of state as to the number of inhabitants of this state, or of any county, town, city or village, borough or district thereof, as shown by the completed and approved enumeration taken under the provisions of this article, shall be received as conclusive evidence of the fact by each and every court of this state.

* * * * * *

Civil Practice Act, Sec. 401, Certificate of Population.

1. A certificate of the director or other office in charge of the census of the United States, attested by the secretary of the interior, or the secretary of commerce, stating the population of any part of the United States, or giving the result of said census otherwise, shall except as hereinafter provided be received as prima facie evidence of such facts.

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Appendix H.

Practice Rules, Promulgated by the Supreme Court of the State of New Jersey, Involved.

1:2-9 Assignment of Error, etc., Abolished.

"Assignments of error, bills of exception, grounds of appeal, petitions of appeal, specification of causes for reversal, and writs of error are abolished."

1:7-1 provides in part: Appellant's Brief and Appendix. "The brief of the appellant shall contain the following matter under distinctive titles, arranged in the following order:

* * * * * *

(c) A statement of the question involved, setting forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind. * * * If the questions involved include any not presented to the court below, this fact shall be noted. * * *"

* * * * * *

(e) The argument for the appellant, which shall be divided, under appropriate headings distinctively printed, into as many parts as there are points to be argued * * *.

1:5-1. Review on Criminal Appeals:

(a) In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury. The court may, however, notice plain errors affecting substantial rights of the defendant, although they were

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not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. * * *

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1:10-1. CERTIFICATION BY THE COURT

(a) Certification shall be allowed where the court of its own motion certifies a cause or class of causes for appeal. * * *

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 642.

JOSEPH DOTO, also known as JOE ADONIS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF FOR PETITIONER.

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ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF FOR PETITIONER.

Reply to Respondent's Point I.

Respondent (page 6) dealing with the admissibility of the ships' manifests, cites a mass of cases which it contends is in harmony with the ruling by the court below. None of the cases cited, except the last one (*Harrison* case), dealt with multiple hearsay but instead involved situations where either the persons making the record had first hand knowledge of its contents or the record constituted an admission against interest. The *Harrison* case was decided by an intermediate appellate court of the State of Pennsylvania which sustained the admission of a ship's manifest for purpose of proving the age of decedent. Whether the information in the manifest as to the decedent's age was furnished

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by him does not appear. This case points up the need for clarification of these statutes by this Court.

The statement in the last paragraph on page 14 of the petition, that Title 28, U. S. Code §§1732 and 1733 have never been considered or construed by this Court, we have discovered to be incorrect. The scope of §1732 was fully considered in *Palmer* v. *Hoffman,* 318 U. S. 109 (1943). The decision of the Supreme Court of New Jersey is in conflict with the *Palmer* case. In addition to the cases cited in the third paragraph at page 16 of the petition, see also *Matthews* v. *United States,* 217 F. 2d 409 (5 Cir. 1954).

Respondent's argument (page 7) and the cases cited therein are in no way applicable to the instant case. The admissibility of the ships' manifests hinged upon whether they were admissible "by virtue of any federal statute to prove the facts therein contained" (Appendix F, p. 52, N. J. S. 2A :82-16). Likewise, under this statute the admissibility of the Italian birth certificates hinged upon whether "the same shall have been first exemplified according to acts of Congress of the United States". The very foundation for the admissibility of these documents depended upon the construction and interpretation of the federal statutes quoted in Appendix E, pp. 50, 51. The determination of such federal law in the application of state law gives rise to a federal question for review by this Court. *Smith* v. *Kansas City Title Co.,* 255 U. S. 180 (1921); *Standard Oil Co.* v. *Johnson,* 316 U. S. 481 (1942). Cf. *Hall* v. *Jordan,* 15 Wallace 393 (U. S. 1872).

Respondent's statement (p. 8) that the New York Census records were admitted into evidence at the trial after proof that they were admissible "in Courts of records of the State of New York as evidence of the contents thereof" is unsupported by the record (N. J. Appendix, p. 243a-38).

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Reply to Respondent's Point III.

Respondent (p. 14) refers to pages 23 to 25 of the petition, and states that the proof there referred to (the fingerprint records and the arrest books) was offered as "admissions of the defendant in contradiction of his expressed belief that he was born in Passaic". The record does not indicate such a statement by the prosecutor. The State offered the fingerprints to establish identity (N. J. Appendix, p. 239a-25), and one arrest book was offered to corroborate the witness Conley's testimony (N. J. Appendix, p. 268a-33). The trial court dealing with the other arrest books indicated that it allowed this proof "for the purpose of identifying the defendant" (N. J. Appendix p. 218a-25, 38).

Respondent (pp. 16 to 19) sets forth a synopsis of the testimony of certain state witnesses as "direct evidence" and draws the conclusion that this proof supports the finding of the court below. There could be no direct evidence of petitioner's state of mind on February 10, 1953 at the time he uttered the statement that he was born in Passaic, New Jersey. Such a statement at best is one of belief.

In this review respondent fails to advert to the reason and purpose for the testimony furnished by the five relatives of the petitioner. Not one of them gave direct testimony as to where petitioner believed he had been born and the sole effect of their combined testimony was to lay the foundation for receiving the exhibits in evidence (New Jersey Appendix, pp. 112a-13; 136a-28; 139a-4, 12 and 22). It was the exhibits (Italian birth records, manifests and census records) and not the testimony of petitioner's relatives, upon which the State relied to prove its case (New Jersey Appendix, p. 261a-25).

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Witnesses Laciskey and Tams (p. 16), employees of the New Jersey State Prison (N. J. Appendix, pp. 80a-20; 82a-25) interrogated petitioner in the course of their duties. The trial court concluded that their testimony was inconsequential (N. J. Appendix, p. 279a-26).

Respecting the testimony of witness Katz (p. 18) respondent failed to disclose that on cross-examination it was developed that petitioner had testified that he believed he had been born in New Jersey (N. J. Appendix, p. 162a-12).

The State in setting forth this proof overlooks the basic principle expressed by this Court in *Kotteakos* v. *United States,* 328 U. S. 750, 765 (1946), where it was held:

> "• • • The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Respectfully submitted,

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Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

JOSEPH DOTO, also known as JOE ADONIS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

I.

Reference to Official Reports of Opinion Delivered In the Court Below.*

The petitioner's reference to the opinion below is correct.

II.

Counter-statement Concerning Jurisdiction.

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involving the questions

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* Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed record of the Court below, defendant's appendix as it was submitted to the New Jersey Supreme Court.

presented in the petition are in conformity with the provisions of the Federal Constitution(1) respecting due process and equal protection of the laws as guaranteed by the United States Constitution, and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

Counter-questions Presented.

1. Whether the indictment is legally adequate and does it charge a crime?
2. Whether the evidence is sufficient to support the conviction of the defendant for falsely swearing that he was born in the City of Passaic, New Jersey?
3. Whether there was any error in the admission into evidence of:
   (a) The Italian vital statistics records?
   (b) The ship manifests filed with the Immigration and Naturalization Service?
   (c) The 1915 and 1925 New York Census?
4. Whether the defendant received a fair trial?
5. Whether the foregoing questions raise issues reviewable by the United States Supreme Court?

---

(1) Constitution of the United States, Amendment XIV, Section 1.

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Counter-statement of Case.

The defendant, Joseph Doto, better known as Joe Adonis, was brought to trial on January 12, 1954 on two indictments, both returned by the Bergen County Grand Jury on February 17, 1953. One indictment (No. 220, R. 1a) charged that defendant willfully swore falsely before the Grand Jury as to the date of his birth. The other indictment (No. 221, R. 2a) charged that defendant willfully swore falsely before the Grand Jury that he was born in the City of Passaic, New Jersey.

The trial was held before a judge, sitting without a jury at the defendant's request (R. 14a-26). The defendant did not take the stand nor did he offer any evidence in his behalf (R. 229a-21). The Court acquitted him on indictment No. 220 and convicted him on indictment No. 221 for falsely swearing that he was born in the City of Passaic, New Jersey (R. 305a-10). He was sentenced (R. 307a-5 to 30) and is not now in confinement under this sentence.

Defendant appealed to the Superior Court of New Jersey, Appellate Division (R. 212a) which appeal was certified to the Supreme Court of New Jersey on its own motion (Appendix C, p. 48).

The Supreme Court of New Jersey unanimously affirmed the judgment of the Superior Court, Law Division (Appendix A, p. 46). Its opinion is reported in 16 N. J. 397 (1955).

Preliminary Statement.

In view of the fact that the reasons urged by the defendant, Numbers 1, 2 and 5, relate to the admission into evidence of documentary proof, they are discussed in our POINT I. Numbers 3 and 4 are discussed in our POINTS II and III.

ARGUMENT.

POINT I.

The Court's rulings as to the admissibility of the documentary evidence present no federal question or basis for review nor do they contravene the due process clause of the Federal Constitution.

The Supreme Court of New Jersey in reviewing the defendant's contention that error was committed in the trial courts' rulings upon objections by the defendant to introduction of evidence by the State prefaced its remarks as follows (Appendix A, p. 39):

> "* * * Our review is expressly designed to insure that the defendant is not deprived of liberty by any error that prejudices his substantial rights, i. e., to insure that the defendant does not suffer any manifest wrong or injury R. R. 1:5-1 (a)."

It then proceeded *seriatim* to review the documentary as well as testimonial evidence presented by the State (Appendix A, p. 40 to p. 45), concluding that the ship's manifests were properly received in evidence in the present matter (Appendix A, p. 43-28); that the birth certificates

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were properly authenticated and admissible as public records of a foreign state or territory, province, county or city in accordance with N. J. S. 2A:82-16 and in the admission of the New York census records for 1915 and 1925, under N. J. S. 2A:82-16 no manifest wrong or injury was sustained by the defendant (Appendix A, p. 45-17).

It is pertinent to point out that the admissibility of the above documentary evidence was grounded on the Statutes of New Jersey which specifically provide (Appendix F, p. 52):

> N. J. S. 2A:82-16.
>
> "Any public record of any foreign state or territory, province, county or city, or of any court therein or any copy thereof, which is admissible in such state, territory, province, county or city, or in any court therein, to prove the facts therein contained, or any duly certified public record of any department of the United States government or of any federal court which is admissible in any federal court or by virtue of any federal statute to prove the facts therein contained, shall be admitted in evidence in the courts of this state, and shall be evidence of the facts therein contained, to the same extent as though the original paper or papers, of which the record thereof is a copy, had been produced and proved; provided, that whenever a copy of such record, other than a duly certified copy of any public record of any department of the United States government or of any federal court, shall be offered in evidence, the same shall not be admitted, unless the same shall have been first exemplified according to the acts of congress of the United States * * * ".

As incidental to such statute the court determined from the federal statutes, 28 U. S. C. A., secs. 1732, 1733 that

these documents were admissible in the federal courts by virtue of federal statutes (Appendix A, pp. 41-42) and therefore admissible in the trial court.

This determination is not in conflict with the applicable decisions of both Federal and State courts.

See: *McInerney* v. *United States,* 143 F. 729, 736-737 (C. C. A. 1, 1906); *Buckley* v. *The United States,* 4 How. 251, 258, 11 L. ed. 961; *Lopoczyk* v. *Chester A. Poling, Inc.,* 152 F. 2d. 457, 459-460 (C. C. A. 2, 1945); *The Ariel,* 119 F. 2d. 866, 867 (C. C. A. 2, 1941); *Chesapeake & Delaware Canal Co.* v. *United States,* 240 F. 903, 907 (C. C. A. 3, 1917); aff'd 250 U. S. 123 (1918); *Wheeler* v. *United States,* 211 F. 2d. 19, 23 (C. A. D. C., 1953); *United States* v. *Rose,* 113 F. Supp. 775 (D. C. Pa., 1953); *Finnegan* v. *United States,* 204 F. 2d. 105 (C. A. 8, 1953), cert. den. 346 U. S. 821 (1953), reh. den. 346 U. S. 880 (1953); *Rennicke* v. *United States,* 207 F. 2d. 429 (C. A. 8, 1953); *United States* v. *Rosenberg,* 195 F. 2d 583 (C. A. 2, 1952) cert. den. 344 U. S. 838 (1952), reh. den. 344 U. S. 889 (1952), reh. den. 74 S. Ct. 860; *Moran* v. *Pittsburgh-Des Moines Steel Co.,* 183 F. 2d 467 (C. A. 3, 1950); *Harrison* v. *Metropolitan Life Ins. Co.,* 168 Pa. Super. 474, 79 A. 2d. 115 (Sup. Ct., 1951).

The validity of the federal statutes was in no way involved nor was there any determination by the New Jersey Court against the validity of the federal statutes above mentioned.

Likewise, with reference to the Italian birth certificates, the Supreme Court of New Jersey determined that the same were admissible under N. J. S. 2A:82-16 and that they had been duly authenticated in accordance with the federal statute 28 U. S. C. A., sec. 1741.

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These rulings on the admissibility of the documentary evidence under the New Jersey Statute above set forth, furnish no basis for review. That they present no federal question, has long been settled by this court.

In *Barrington* v. *Missouri,* 205 U. S. 483 (1906) the Court said, at page 486, with reference to the admission into evidence of certain statements or confessions:

> "* * * And if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the constitution and laws of the State of Missouri, the record affords no basis for the holding that he was not awarded due process of law."

The states are free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate. The Fourteenth Amendment does not permit a party to bring to test in the United States Supreme Court every ruling made in the course of a trial in the State Court nor does it enable this court to review errors of State law however material under the law. *Buchalter* v. *New York,* 319 U. S. 427, 429, 431 (1942). In the last cited case the court said at page 431:

> "* * * As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under the law. We are unable to find that the rulings and instructions under attack constituted more than errors as to State law. We cannot say that they were made as to deprive the petitioner of a trial according to the accepted course of legal procedings."

See also: *Los Angeles Farming, etc. Co.* v. *Los Angeles, Cal.,* 217 U. S. 217 (1910); *West* v. *Louisiana,* 194 U. S. 258 (1904); *Frank* v. *Mangum,* 237 U. S. 309, 326 (1915); *Young*

v. *Territory of Hawaii,* 160 Fed. 2d 289 (C. C. A. 9, 1947) Cert. den. 331 U. S. 849 (1947); *Lisenba* v. *California,* 314 U. S. 219, 228, 236 (1941).

As was said in *Stein* v. *New York,* 346 U. S. 156 (1953) at page 196:

> "* * * The hearsay evidence rule, with all its subleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

Nor is there any right of confrontation secured by the Fourteenth Amendment as contended by defendant (P. 13-25), *Stein* v. *New York, supra,* at p. 195; *West* v. *Louisiana, supra,* at p. 262. See also *Heike* v. *United States,* 192 F. 83, 94 (C. C. A. 2, 1911). Due process of law does not assure a litigant against wrong interpretaion of law, especially procedural, or against judicial error in admission on exclusion of evidence. *O'Brien* v. *O'Brien,* 294 Ky. 793, 172 S. W. 2, 595, 609 (1942); *Milwaukee E. R. & L. Co.* v. *Wisconsin Ex Rel. Milwaukee,* 252 U. S. 100, 106 (1919).

It is to be observed that nowhere in defendant's petition does he assert that the *validity* of any federal statute was drawn into question. (Italics supplied).

The mere determination by the Supreme Court of New Jersey that the documentary proofs were admissible in evidence and that they satisfied the federal statutes as to exemplification and admissibility does not draw into question the validity of any federal statute nor raise any federal question requiring review by this Court.

It is also to be observed that the admission into evidence of the 1915 and 1925 New York Census after proof that these records were admissible in Courts of records of the

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State of New York as evidence of the contents thereof, and as proof of the number of citizens inhabitants to delimit assembly district boundary lines and that they were required to be kept as a public record (R. 241a to R. 242a) was in accordance with N. J. S. 2A:82-16. No federal question with reference thereto was raised in the trial court nor on appeal (Appendix A, p. 44-36). Defendant contended that they were not admissible as evidence in New York State and hence not admissible under N. J. S. 2A:82-16. It is only now that defendant contends (p. 28) "that a novel federal question is involved respecting whether or not the Courts of the State of New Jersey must give full faith and credit to the public acts of the State of New York. In any event the validity of the New York Statute concededly is not involved and no question can therefore arise under the "full faith and credit" clause of the Federal constitution.

Western L. Ind. Co. v. *Rupp,* 235 U. S. 261 (1914);
Allen v. *Alleghany Co.,* 196 U. S. 458 (1904).

It is submitted that the rulings of the Courts below as to the admissibility of the documentary evidence presents no federal question or basis for review nor do they contravene the due process clause of the federal constitution.

POINT II.

Aside from defendant's failure to object to the alleged variance between the indictment and the proof adduced, it was raised for the first time on the appeal and in any case presents no federal question.

Defendant at the trial did not contend that he was not aware of the charge against him; he didn't object that there was a variance between the indictment and the proofs adduced by the State (P. 8-25), it was raised for the first time on appeal (P. 17-6).

Referring to this phase of the case the Supreme Court of New Jersey, in its opinion, said (Appendix A, p. 35):

> "The first question involved is addressed to the sufficiency of the indictment. Doto contends that in Indictment No. 221 the alleged false statement is not adequately negatived by an averment of the true fact. If error in the format of the indictment exists as alleged by Doto, it is asserted for the first time in this appeal. The indictment sufficiently apprised him of the charge against him and was subject to amendment under R. R. 3:4-5, formerly Rule 2:4-13."

The court however proceeded with this contention contrary to petitioner's statement (P. 17-12) that "the court below did not notice this issue or pass upon it," and pointed out that the case was "a prosecution for the statutory offense of false swearing under N. J. S. 2A:131-4, *et seq.* (Appendix A, p. 35-39); and that:

> "Where the accused 'has sworn only to his belief, it will be proper to aver either that the defendant did not believe what he swore, or that 'he well know'

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> to the contrary! 2 Wharton's Criminal Law, *ante*, sec. 1568, p. 1826. It is said that in this respect indictments for perjuring are sufficient if they state that the testimony of the defendant was false. 41 Am. Jur. Perjury, sec. 33, p. 20. Cf. State *v.* Sullivan, 25 N. J. Super. 484, 492 (App. Div., 1953), certification denied 13 N. J. 289 (1953), Cert. den. 347 U. S. 902, 98 L. ed. (1954) * * *'' (Appendix A, p. 37).

The court concluded:

> "Further the indictment for false swearing is concerned with a statutory offense. The indictment in the present case was in the statutory language and explicitly apprised the defendant of the offense charged. It is in these respects adequate under the principles embodied in State *v.* Harris, 132 N. J. L. 54, 57 (Sup. Ct., 1944). Cf. State *v.* Morris, 98 N. J. L. 621, 623 (Sup. Ct., 1923), aff'd *per curiam*, 99 N. J. L. 526 (E. & A., 1924). The essence of the constitutional right in relation to the sufficiency of an indictment is that the accused be 'informed by the indictment in certain, definite and understandable terms of the crime charged to him.' State *v.* Grothmann, 13 N. J. 90 (1953). We find that Indictment No. 221 meets this test. Cf. State *v.* Kowalczyk, 3 N. J. 51, 55-56, 60-61 (1948)."

This conclusion is more than amply supported by the reported cases in New Jersey.

See:

> *State* v. *Ellenstein*, 121 N. J. L. 304, 324 (Sup. Ct. 1938); *Joseph L. Sigretto & Sons, Inc.* v. *State*, 127 N. J. L. 578 (Sup. Ct. 1942); *State* v. *Eisenstein*, 16 N. J. Super. 13 (App. Div. 1951); aff'd 9 N. J. 347 (1952); *State* v. *Siegler*, 22 N. J. Su-

per. 224 (App. Div. 1952), aff'd 12 N. J. 520, 524 (1953); *State* v. *Borelli*, 27 N. J. Super. 223 (Hudson Co. Ct. 1953); *State* v. *Engels*, 32 N. J. Super. 1, 9 (App. Div. 1954); *State* v. *Costa*, 11 N. J. 239, 246-247 (1953).

Furthermore whether or not the indictment sufficiently charged the offense is not a federal question which can be made the basis of review on certiorari. The defendant recognized in his petition, page 17, that the sufficiency of the indictment does not present a federal question. This the court has so held.

In *Howard* v. *Fleming*, 191 U. S. 126 (1903) the court said at page 135 with reference to the question of the sufficiency of an indictment in the state court:

> "* * * In other words, the Supreme Court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and, that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the Supreme Court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense. Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; Davis *v.* Texas, 139 U. S. 651, 652, 35 L. ed. 300, 301, 11 Sup. Ct. Rep. 675; Bergmann *v.* Bocher, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727."

See also *Barrington* v. *Missouri*, 205 U. S. 483, 486-487 (1906).

It is respectfully submitted that the deficiencies of the indictment, if any, present no question for review by this court.

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POINT III.

It appears from the entire record of the proceedings that the defendant received a fair and impartial trial and that the evidence supports the finding of the court.

The defendant urges as a basis for review that he was denied a fair trial by the injection of "inflammatory and prejudicial" proof (P. 22). He states that while the Supreme Court of New Jersey in its opinion remarked that this was a question not presented to the trial court, "To the contrary we maintain that this question was properly presented to the trial court" (P. 22-25 to 30). A reading of the "Statement of the Questions Involved" contained in petitioner's brief on appeal to the State court leaves no doubt as to where the truth lies. He there stated:

> "6. Is the defendant denied fair play where the prosecution injects incompetent evidence of a prejudicial and inflammatory nature which influenced the trial court in arriving at a verdict? This question was not presented to the court below."

As pointed out by the Supreme Court of New Jersey (Appendix A, p. 46):

> "The defendant's question whether he was denied a fair trial by injection of 'inflammatory and prejudicial' proof was admitted by him to be a question not presented to the trial court. This question relates to the evidence of prior arrests and fingerprinting. The trial court ordered stricken from the record the greater portion of this testimony. What remained was incidental disclosures of prior arrests

during the course of a New York police officer's testimony concerning admissions by Doto as to the date of his birth. Under the circumstances of this case, no error is disclosed. Cf. State *v.* Grillo, 11 N. J. 173, 183 (1952), Cert. Den. 345 U. S. 976, 97 L. Ed. 1391 (1953)".

While defendant urges that the fingerprints introduced for identification and the testimony of various witnesses with reference thereto (P. 23 to P. 25) indicates the prejudicial nature thereof, the Court struck all testimony of witnesses in regard to the fingerprints of the defendant (R. 298a-27 to 32) and defendant could not have been prejudiced thereby. This proof was not, as the defendant argues (P. 25), offered to show arrests, but to introduce admissions of the defendant in contradiction of his expressed belief that he was born in Passaic. It was clearly material.

It should, however, be noted that the trial was heard, at the request of the defendant, without a jury and it may be presumed that the judge necessarily disregarded any incompetent evidence. *Rolley, Inc.* v. *Young Husband,* 204 Fed. 204. 212 (C. A. 9, 1953). As a matter of fact he excluded the tendered evidence and in any event the defendant did not suffer any manifest wrong or injury within the Rules of the Court. (Appendix H, p. 56).

Defendant's observations (P. 27) that the trial judge was influenced by the stricken evidence is without merit. These remarks were made on February 2, 1954 the date of sentence (R. 307a), some two weeks after January 18, 1954, the date when the court made its findings of fact and held the defendant guilty as charged. They were obviously based upon the pre-sentence investigation report (R. 308a-7 to 11) required to be made under the New Jersey

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laws, and prepared after the verdict of guilty for the court's use on the day of sentence. They were not such as could deprive the petitioner of a trial according to the accepted course of legal proceedings.

The case of *Townsend* v. *Burke*, 334 U. S. 736 (1948) and *Keenan* v. *Burke*, 342 U. S. 881 (1951) are without application to the matter *sub judice*. There defendant pleaded guilty and false statements were made to the judge upon which the sentence was based. Defendant was without counsel and was afforded no opportunity to correct the improper impression. Such is not the case here.

While defendant did not assert in the State Supreme Court as a question involved "that the trial court's findings were against the weight of the evidence", he sought there to attack the same (Appendix A, p. 46).

The Supreme Court of New Jersey "examined the record meticulously to determine whether the evidence supports the findings and judgment of the Trial Court" (Appendix A, p. 46). It concluded that "the evidence clearly is adequate and we see no occasion to recite it in detail".

From a procedural standpoint, under Rule 1:7-1 of the Supreme Court of New Jersey (Appendix H, p. 56) and the decision thereunder, ordinarily, no point would be considered on appeal which was not set forth in or necessarily suggested by the "Statement of Questions Involved," *State* v. *Janiec*, 11 N. J. 397 (1953). The court would well have refused to consider this question, however it did and as we show below the evidence was clearly adequate to support the findings of the court.

In addition to the documentary evidence the record discloses the following direct evidence.

Witness Laciskey identified the defendant (R. 80a-30) as the person who stated to him on May 29, 1951, that his father was Michael Doto (R. 81a-17), that his mother was Maria DeVito Doto (R. 81a-21) and that they were both born in Italy (R. 82a-7).

Witness Toms identified the defendant (R. 82a-36) as the person who stated to him on August 2, 1951 that his father's name was Michael (R. 83a-19), that he was born in Italy (R. 83a-21), that his mother's name was Mary (R. 83a-24), that she was born in Italy (R. 83a-26), that he had four brothers whose names and age sequence, including himself were, Anthony, the oldest, then Albert, then defendant and a younger brother named James (R. 83a-30 to 33). He also testified that defendant stated that his brother Anthony was born in Italy (R. 83a-35), his brother Albert in Italy (R. 84a-5) and that his brother James was born in New Jersey (R. 84a-17).

Ferdinand DeVito identified the defendant as his nephew (R. 86a-5). He testified that he was born in Montemarano, Italy on January 21, 1880 (R. 86a-5 to 21); that he arrived in New York on May 20, 1901 (R. 87a-29) from Montemarano (R. 94a-24); that his older sister Marie DeVito (R. 86a-30) married Michael Doto, the father of the defendant (R. 88a-13 to 16) and that when he, Ferdinand left Montemarano in 1901 his sister Marie and her husband Michael were living together in Montemarano (R. 94a-30). He further stated that his brother-in-law came to this country in 1903 (R. 89a-31) and lived at 507 President Street in Brooklyn in the same building where Ferdinand lived (R. 89a-34). He stated that Maria was not with Michael at that time (R. 90a-7) nor was she in this country when Michael went back to Italy in 1904 or 1905 (R. 90a-

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22 to 23) or when he came back to the United States in 1906 (R. 90a-28 to 36). It was in 1909 or 1910 that his sister Maria first came to this country (R. 90a-39 to R. 91a-7). Ferdinand further testified that his sister Maria had five children with Michael Doto (R. 91a-12) who, in order of their birth are Anthony, Albert, Joseph, Jimmie and a sister who died (R. 91a-35 to 39); that the defendant is the Joseph named (R. 92a-14); that Michael sent for Maria (R. 95a-28) while he was living at President Street in Brooklyn to which the Doto family came to live when Maria arrived in this country (R. 95a-15 to 22); that he visited Maria and her family at President Street and that the family of Michael and Maria consisted of the children Anthony, Albert, Joseph, James and Angelina (R. 96a-6 to 27). He didn't remember whether his brother-in-law Michael ever lived in Passaic, New Jersey (R. 98a-17).

John DeVito identified the defendant as his nephew, the son of his sister Maria (R. 98a-38). His testimony is identical with that of his brother Ferdinand and corroborates the arrival of his sister Maria in 1909 or 1910 with her children whose names in the order of their ages were Tony, Al, Joe and Jimmie the Italian equivalents of which he stated are Antonio, Umberto, Giuseppe and Generio (R. 99a-32 to R. 105a-40).

Anthony Doto identified the defendant as his brother Joseph (R. 116a-24 to 28). He testified that he was born in Montemarano, Italy on November 12, 1898, that his father was Michael, his mother Maria, whose maiden name was DeVito (R. 116a-32 to 40) and that he came to this country in 1909 (R. 117a-5). He further testified that he has three brothers, younger than he and in the order of

their ages they are Albert, Joseph and Jimmie, Albert being two years younger than he, and Joseph two years younger than Albert (R. 117a-36 to R. 118a-11). He related the various residences where he, his family and brothers resided (R. 119a-30 to R. 120a-30) and that he used the name Adonis beside Doto (R. 121a-9).

Albert Doto testified that his Italian name is Ettore, that he is a registered alien born in Montemarano, Italy, on June 8, 1900, that his father's name is Michael and his mother Maria DeVito (R. 130a-38 to R. 131a-11). He identified his uncles and brothers including defendant (R. 131a-14 to 24) and stated that he learned from his parents that he came to this country in 1909 (R. 131a-28).

Further proof was adduced from the testimony of Salvatore J. Cella, a relative of the Dotos' as to the domicile of the Doto family and its members (R. 171a-20 to R. 172a-17).

Sidney Katz, stenographer at the defendant's deportation hearing in June, 1953, testified that the defendant under oath, stated that he was told that he came to this country from Italy with his mother and that he was accompanied on his arrival in 1909 by his mother and his three brothers (R. 154a-33 to R. 157a-36).

In addition the New York police officer, Conley testified that on February 5, 1922, the defendant, in his presence, at the police station, stated to the desk officer, Lieutenant Donovan, that he was born in Italy and was in this country approximately 10 years (R. 149a-20); that he was 19 years of age, lived at No. 284 Third Avenue and by occupation was a shoe clerk.

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The age given corresponds with the date of birth, November 22, 1902, appearing in the exemplified birth records of Guisepp-Antonio and the occupation as that testified to by his uncle John (R. 104a-14).

From this testimony it is respectfully submitted that the evidence supports the finding of the court that the defendant was in fact born in Italy; that on February 10, 1953, he willfully, intentionally and knowing the same to be false, swore before the Grand Jury that he was born in Passaic, New Jersey (R. 304a-21 to 29). The admission into evidence of the documentary proof as corroboration of the above direct testimony (R. 296a-14 to R. 298a-14) therefore did not prejudice defendant's substantial rights nor did it deprive him of a fair and impartial trial.

It is respectfully submitted that the defendant received a fair and impartial trial; the evidence supports the findings of the Court and in any event the question was not presented to the court below and does not present a basis for review by this Court.

Conclusion.

The attempt by the petitioner to bring the case at bar within the scope of the review power of this Court as shown, *supra*, is actually without merit. Most of the questions presented here quite properly could have been disregarded by the Supreme Court of New Jersey as not having been presented to the trial Court. Yet the Supreme Court of New Jersey reviewed the case and concluded that various documentary evidence was properly admitted within the statutory and decisional law of New Jersey; that no manifest

wrong or injury was sustained by the defendant thereby and that the evidence supported the findings and judgment of the Trial Court.

In view of the non-federal questions raised by the petitioner, it is respectfully submitted that the petition for a writ of certiorari, should be denied.

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APPENDIX.

Statutes Involved.

N. J. S. 2A:131-6—Corroboration unnecessary; proof of materiality.

Corroboration on proof by more than one witness to establish the falsity of testimony or statements under oath is not required in prosecution under this article. It shall not be necessary to prove to sustain a charge under this article, that the oath or matter sworn to was material or, if before a judicial tribunal, that the tribunal had jurisdiction.

N. J. S. 2A:131-7—"Willful" defined.

"Willful" shall, for the purposes of this article, be understood to mean intentional and knowing the same to be false.

N. J. S. 2A:82-27—Judicial notice of foreign law; presumption as to common law.

Whenever the common or statute law of any state is pleaded in any action in any court of this State, the court shall take judicial notice thereof. In the absence of such pleading, it shall be presumed that the common law of such state is the same as the common law as interpreted by the courts of this State.

N. J. S. 2A:82-28—Information of the Court.

The Court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid in obtaining such information.

Statutes Involved.

N. J. S. 2A:82-34—"Business" defined.

> The term "business" as used in this article shall include every kind of business, profession, occupation, calling on, operation of an institution, whether carried on for profit or not.

N. J. S. 2A:82-35—Business Records as evidence.

> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation; and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the source of information, method and time of preparation were such as to justify its admission.

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